Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

October Term, 1983

LOUIE L. WAINWRIGHT,
Secretary,
Florida Department of Corrections,
and DAVID H. BRIERTON,
Superintendent of Florida State Prison,

Petitioners,

vs.

HOWARD VIRGIL LEE DOUGLAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE CONTINUED REJECTION OF THE FLORIDA SUPREME COURT'S STANDARD OF SIXTH AMENDMENT ASSISTANCE OF COUNSEL BY THE COURT OF APPEALS REQUIRES THIS COURT'S INTERVENTION AND ULTIMATE RESOLUTION OF THE CONFLICT AS IN THE PENDING CASE OF STRICKLAND V. WASHINGTON, CASE NO. 82-1554?

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). (App. 1-125) That decision reviewed the judgment of the district court reported at Douglas v. Wainwright, 521 F.Supp. 790 (M.D. Fla. 1981). Opininons of the Supreme Court of Florida are reported at Douglas v. State, 328 So.2d 18 (Fla. 1976), cert.den. 429 U.S. 871 (1976), and Douglas v. State, 373 So.2d 895 (Fla. 1979).

II

JURISDICTION

The United States Court of Appeals by a two-to-one decision, on September 19, 1983, affirmed in part and reversed in part the United States District Court's denial of the defendant's petition for writ of habeas corpus. As

to that part of its decision reversing on the Sixth Amendment issue, the State of Florida filed its petition for rehearing and suggestion of en banc consideration. The state also filed a motion to stay mandate so that it could seek certiorari review in this Court.

On October 21, 1983, both the petition for rehearing and suggestion for rehearing en banc were denied and on October 26, 1983, an order was entered staying mandate until November 21, 1983, and continuance thereof being conditioned upon the Clerk of this Court notifying the Clerk of the Eleventh Circuit Court of Appeals of the state's petition for writ of certiorari being filed.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. §1254(1).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, where district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitution of the United States provides *inter alia*, that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV

STATEMENT OF THE CASE

Douglas was convicted of the first degree murder of Jesse Atkins. Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). The probable motive for the killing was based upon Douglas' prior

romantic involvement with the wife of the victim. Id. at 1535. On July 16, 1973, Douglas forced the vehicle in which the victim and his wife were riding off the road and at gunpoint entered the vehicle and forced the victim to drive to a wooded area near Brewster, Florida. Id. at 1536. While still at gunpoint, Atkins and his wife were forced to undress and perform certain sexual acts. Id. Douglas then struck Mr. Atkins in the head with the rifle shattering the rifle stock and then fired several shots into his head, killing him. Id. Douglas then forced the victim's wife to perform various sexual acts with him. Id.

After the proceeding which determined guilt, Douglas' attorney informed the trial court that he had no evidence in mitigation to present. The state

presented no evidence in the penalty phase of the trial and after short summations by both sides, the jury unanimously recommended that the trial judge impose a sentence of life imprisonment on Douglas. Id. at 1558.

After considering the case for purposes of sentencing, the state trial judge determined the existence of one aggravating factor under Florida's capital sentencing law, that the capital murder was especially heinous, atrocious, and cruel. (Transcript of trial, Vol IV, p. 757) Because of the refusal of Douglas to take the stand and offer any evidence of mitigation and because no evidence of mitigation was produced at all, the state trial judge ordered a presentence investigation report "to see if there could be in existence any mitigating circumstances which would justify the reduction of the sentence."

Id. at 758. That report revealed a 37 year old defendant who, because of an extensive criminal record, had spent 17 years in prison. No mitigating circumstances were disclosed and the trial court imposed the sentence of death upon Douglas. Id. at 760. The judgment of guilt and sentence of death were affirmed by the Florida Supreme Court. Douglas v. State, 328 So.2d 18 (Fla. 1976).

Douglas sought a writ of certiorari from this Court raising claims directed to the constitutionality of capital punishment and an issue involving a public trial. This Court denied the petition for writ of certiorari. Douglas v. Florida, 429 U.S. 871 (1976). Because of the grant of certiorari in Gardner v. Florida, 430 U.S. 349 (1977), Douglas petitioned for rehearing. Response directed to the Gardner issue

was requested by the Court, Douglas v. Florida, 429 U.S. 974 (1976), and rehearing was then denied. Douglas v. Florida, 429 U.S. 1055 (1977).

Approximately two and a half years later, a warrant was signed ordering Douglas' execution. Douglas returned to the state trial court filing a motion for post-conviction relief which was denied. Douglas raised a general claim of ineffective assistance of counsel at the sentencing proceeding. On appeal, the Florida Supreme Court rejected this claim finding no factual support therefor, an affirmative showing to the contrary in the trial court, and a conclusive refutation by the record in that counsel for Douglas secured the very best available, to wit: a recommendation of life from the jury. Douglas v. State, 373 So.2d 895 (Fla.

1979). In response to a suggestion that trial counsel was "ineffective" because he failed to persuade the trial judge to follow rather than override the jury's recommendation, the unanimous court did not consider "meritorious to any degree" that proposition. Id. at 896.

Douglas sought federal habeas corpus relief in the United States District Court, Middle District of Florida, Tampa Division. Among other claims, he presented the ineffective assistance of counsel at sentencing claim regarding the failure of counsel to persuade the trial judge to follow the jury recommendation. That claim was rejected, the district judge stating that "Clearly this claim is insubstantial". Douglas v. Wainwright, 521 F.Supp. 790 (M.D. Fla. 1981).

On appeal, the Eleventh Circuit Court of Appeals affirmed the district

judge in rejecting all other claims but reversed on the Sixth Amendment right to counsel claim determining that Douglas was deprived of his right to effective counsel since counsel presented no evidence in mitigation and further, assuming the absence of any evidence in mitigation, certain remarks of counsel made to the trial judge necessarily prejudiced the sentencer against Douglas so as to impose a sentence of death rather than following the jury's recommendation. Douglas v. Wainwright, 714 F.2d at 1557.

The Eleventh Circuit noted its own decision in Washington v. Strickland, 693 F.2d 1243 (5th Cir., Unit B 1982), en banc, which rejected the standard of effective assistance of counsel utilized by the State of Florida. It likewise noted that this Court had granted a petition for certiorari in

that case but nevertheless held that regardless of the standard used, Douglas was so deprived of his right to counsel that the fact literally "cried out" from a reading of a transcript. 714 F.2d at 1557.

The facts, material to consideration of the question presented are that after the jury returned its verdict of guilty, it was sent to lunch and the court announced to the attorneys that upon the jury's return, the second stage, or penalty proceeding, would commence and that the attorneys were to be prepared at that time. (Transcript of testimony, Vol. IV, p. 604-630; App.129). Upon commencement of that proceeding, the jury was briefly instructed as to the nature of that phase of trial and Douglas' attorney began to present argument to the jury. (App.133) The state remarked that it did not think

that argument at that stage was appropriate. (App.133) The court reminded counsel that it was the time for taking of evidence and counsel responded that he had no evidence to submit. (App. 134) At that time the trial court and counsel retired to the conference room and defense counsel was told that since Douglas had been convicted, all evidence in mitigation was to be presented and that the statute did not limit the presentation of such evidence. (App.134) Counsel for Douglas then objected to being forced to proceed with such short notice and that he had been unable to obtain any evidence. (App.135) Counsel stated that neither he nor Douglas knew of any evidence in mitigation that could be obtained. (App. 136) Counsel inquired whether the court would allow Douglas' mother to take the stand and testify: "...I don't want my boy to go to the

electric chair." (App. 137) The court responded: "She could testify that he had been a good boy, if that be the case, and, of course, we all know he's ..." (App. 137) Counsel replied with the rather obvious conclusion that Douglas hadn't been a good boy. (App. 137) The question of Douglas taking the stand on his own behalf was raised and discussions were had concerning the possibility that Douglas would be cross-examined.

Counsel then conferred with Douglas. (App. 139) Douglas was then told personally by the trial court that his attorney had concern for putting him on the stand for fear of cross-examination as to his past record. (App. 139) The court explained to Douglas that this was the opportunity for him to offer any excuse or justification or anything else to cause the jury to recommend mercy.

(App. 139) The court had obtained a copy of Douglas' record and was fully familiar with it in the event such a proceeding was necessary. (App. 140) When asked whether any members of Douglas' family should have been brought in, Douglas specifically stated that he did not wish any members of his family brought in. (App. 141) Douglas told the trial court: "I don't want to take the stand." (App. 141) When asked if he realized it was his right under the constitution and the laws Douglas replied,"Yes sir, I do." (App.141)

Further conference with the attorneys revealed Douglas' lawyer informing the court that he was not familiar with the proceeding in that it was the first he had ever been involved in. The court noted that it was the first anybody had been involved in that type proceeding. (App.142)

The trial court affirmed the fact that counsel could tell everybody why he thought the death penalty should not be applied. (App.142) Counsel objected again that he did not have ample time to either investigate or prepare for any such argument, evidence, or "otherwise" that might be presented on behalf of the defendant in mitigation. (App.145) He repeated that he was unaware of any witnesses that could be called. (App. 145) Counsel stated that although he had briefly discussed this with Douglas, neither Douglas nor the attorney was prepared to offer anyone to present evidence in mitigation. (App.147) The court directed counsel to get with Douglas and determine if he had names of anyone he could call in his behalf and if that were the case, then a reasonable continuance would be granted. (App.147) Counsel could not assure the

court that there was any witnesses (App. 148) He had no witnesses, he knew of no witnesses, and Douglas could tell him of no witnesses. (App. 148) Douglas's attorney, now deceased, was a veteran criminal defense lawyer, and a former Assistant United States District Attorney, who had represented Douglas in the past. (Transcript of Hearing, July 17, 1979, App. 152) After remarks by both counsel for the state and the defense that they were unsure and unprepared as to how to precisely proceed in this particular type of proceeding, counsel for Douglas remarked that the only thing he could do was argue that the jury was dealing with a human life. (App. 149)

After short argument from both sides, the jury recommended the imposition of life imprisonment. (App. 151)

Four months later at the sentencing proceeding, certain other motions were

filed pro se by Douglas. During the course of these proceedings, Douglas acknowledged that during the penalty phase of trial, the trial court personally asked him to produce witnesses why he "shouldn't go to the electric chair." (App.154) Douglas acknowledged that the court actually urged him to do so but noted that any witnesses he could have produced at that time would have only gone to rebut the testimony of the victim's wife and ostensibly would have gone to an alibi defense. (App. 155)

V

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28, §2254 U.S.C.

VI

REASONS FOR GRANTING THE WRIT

As long as the Eleventh Circuit rejects the Florida test for measuring the constitutional standard for assistance of counsel, it creates and will continue to create not only a conflict but also an insoluble situation which can and must be resolved by this Court alone.

Any time the Florida Supreme Court (or any other state tribunal for that matter) applies the test derived from United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979), en banc, and enunciated as controlling in Knight v. State, 394 So.2d 997 (Fla. 1981), and concludes that no deprivation of a Sixth Amendment right occurred, that determination will effectively be reversed by the Eleventh Circuit.

Consequently, there exists such federal-state friction that unless this Court harmonizes the decisions on the

issue, Florida will be improperly forced to subordinate its view of the law to one of the Eleventh Circuit which is clearly in conflict with other circuits.

Widespread conflict among the circuits and state jurisdictions exists as an additional compelling reason for the exercise of this Court's jurisdiction. Decisions of the First, Second, Fifth, Seventh, Eighth and Ninth circuits, consistent with Decoster and Knight appear to require that a defendant demonstrate that his claim have a likelihood of affecting the outcome of the cause.[1] However, other decisions of those same courts have also applied a minimal showing of prejudice

[1] See, e.g., LiPuma v. Commissioner Department of Corrections, 560 F.2d 84, at 92 (2d Cir. 1977), cert.den. 434 U.S. 861 (1977); United States v. Williams, 575 F.2d 388, at 393 (2d Cir. 1978), cert.den., 439 U.S. 842 (1978); Washington v. Estelle, 648 F.2d 276, at

[Footnote 1 cont.]

279 (5th Cir. 1981); Buzzardo v. Benston, 643 F.2d 1300 (7th Cir. 1981); United States v. Cooper, 580 F.2d 259, at 263 n 8 (7th Cir. 1978); United States v. Ingram, 477 F.2d 236, at 240 (7th Cir. 1973), cert.den. 414 U.S. 840 (1973); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) en banc, cert. den. 440 U.S. 974 (1979); United States v. Altamirano, 633 F.2d 147, at 152-152 (9th Cir. 1980).

requirement.[2] The Third, Fourth, Sixth and Tenth circuits have either presumed prejudice after an initial showing of ineffective counsel or not required any showing of prejudice by a defendant.[3] In direct contrast, at least (20)

2See e.g., David v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980) (assuming prejudicial error from failure to investigate); United States ex rel. Healey v. Cannon, 553 F.2d 1052, at 1057, n 7 (7th Cir. 1977), cert.den. 434 U.S. 874 (1977) (the harmless error rule is inapplicable to ineffective assistance of counsel claims); Wade v. Franzen, 678 F.2d 56 (7th Cir. 1982).

3See, e.g., Baynes v. United States, 687 F.2d 659 (3d Cir. 1982) (any showing

[Footnote 3 Cont.]
of harm requires a new trial); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) en banc, cert.den., 435 U.S. 1011 (1978) (assuming prejudice if attorney is not "within the range of competence"); United States v. Gelardy, 567 F.2d 863, at 865 n. 1 (6th Cir. 1978), cert.den., 439 U.S. 842 (1978) (same); United States v. Golub, 638 F.2d 185 (10th Cir. 1980) (proof of specific prejudice is not required); United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) (no prejudice required).

states either expressly adhere to the standard in Decoster and Knight or have centered their analysis of ineffective counsel claim upon a due process and fair trial analysis as to whether a defendant has demonstrated any likely effect upon the outcome of the cause.[4] At least another twelve (12) states, while modifying the "farce and mockery"

4See, State v. Hyman, 281 S.C.2d 209 (S.C. 1981); Commonwealth v. Borelli, 431 A.2d 1067 (Pa. 1981); Cason v. State, 610 S.W. 2nd 891 (Ark. 1981); Baker v. State, 403 N.E. 2d 1069 (Ind. 1980); State v. LePage, 630 P.2d 674 (Idaho

[Footnote 4 Cont.]

1981); State v. Tucker, 539 P.2d 556 (Idaho 1975); see also, Blackmon v. State, 274 Ark. 202, 623 S.W. 2d 184 (1981); People v. McClure, 190 Colo. 250, 545 P.2d 1038 (1976); Merida v. State, 383 N.E. 2d 1043 (Ind. 1979); Hall v. Commonwealth, 557 S.W. 2d 420 (Ky. 1977); State v. Billiot, 370 So.2d 539 (La. 1979); Lizotte v. State, 247 A.2d 98 (Me. 1968); Berry v. State, 345 So.2d 613 (Miss. 1977); State v. Miller, 453, 568 P.2d 130 (1977); Seales v. State, 580 S.W. 2d 733 (Mo. 1979); White v. State, 591 P.2d 266 (Nev. (1979); State v. Edge, 57 N.J. 580, 274 A.2d 42 (1971); Zimmer v. Langlois, 95 R.I. 446, 188 A.2d 89 (1963); State v. Brech, 84 S.D. 177, 169 N.W. 2d 242 (1969); Heinlin v. Smith, 542 P.2d 1081 (Utah, 1975); Hoffer v. Peyton, 207 Va. 302, 149 S.E.2d 893 (1966); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979).

standard for review of claims of ineffective counsel, still maintain an outcome oriented, fair trial test.[5] The apparent conflict with the foregoing decision also warrants jurisdiction under Rule 17 and the substantive law.

[5]See, Risher v. State, 523 P.2d 421 (Alaska 1974); State v. Watson, 653 P.2d 351 (Ariz. 1982); People v. Pope, 152

[Footnote 5 Cont.]

Cal. Rptr. 732, 590 P.2d 859 (1979); State v. Clark, 170 Conn. 273, 365 A.2d 1167 (1976); People v. Greer, 79 Ill.2d 103, 402 N.E. 2d 203 (1980); People v. Kees, 32 Ill.2d 299 at 305, 205 N.E. 2d 729 (1965); Commonwealth v. Satterfield, 373 Mass. 109, 364 N.E. 2d 1269 (1977); White v. State, 309 Minn. 476 248 N.W. 2d 281 (1976); Johnson v. State, 620 P.2d 11 (Okla. Cr. 1980); Orona v. State, 638 P.2d 1077 (N.M. 1982); State v. Sanchez, 652 P.2d 1232 (N.M. 1982); People v. DeGraffenried, 19 Mich. App. 702, 173 N.W. 2d 317 (1969); Benoit v. State, 561 S.W. 2d 810 (Tex. Crim. 1977); State v. Hester, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976); see, also, Seales v. State, 580 S.W. 2d 733 (Mo. 1979) (applying fair trial and Eighth Circuit, "reasonable competent attorney" test); Woody v. United States, 369 A.2d 592 (D.C. App. 1977) ("gross incompetence" test applied to claims raised after trial); Harris v. State, 293 A.2d 291 (Del.Sup. 1972) ("genuine and effective representation" test); Schoonover v. State, 218 Kan. 377, 543 P.2d 881 (1973) ("complete absence of counsel" test); Schoonover v. State, 2 Kan. App. 2d 481, 582 P.2d 292 (1978); People v. Garrow, 51 App. Div.2d 814, 379 N.Y.S.2d 185 (1976) ("farce and mockery"); Lewis v. State, 369 So.2d 542 (Ala.App. 1978), cert.den. 367 So.2d 542 (Ala. 1978) ("sham" test); In Re Cronin, 133 Vt. 234, 336 A.2d 164 (1975) ("mockery of justice").

Based on the material facts presented herein, the Eleventh Circuit squarely held that Douglas' lawyer rendered ineffective representation and that the representation created both factual and substantial disadvantage to the course of the defense and a great likelihood that counsel's inadequacy affected the outcome of the trial.

That holding was predicated upon, as best our analysis yields, two conclusions. The first was that counsel did absolutely nothing in terms of preparation for the penalty phase of trial and thus produced nothing in mitigation on Douglas' behalf. The second conclusion, and we are unsure whether it is on a parity with the first or an extension thereof, was that given a complete absence of anything in mitigation that could have been produced, remarks of counsel to the alleged

effect that Douglas was a bad person and/or there was no such evidence made almost four months prior to sentencing necessarily caused the sentencing judge to fail to follow the jury recommendation of life.

The Eleventh Circuit apparently depends on the notion that some mitigating evidence surrounds any capital defendant. If a lawyer doesn't discover and produce that evidence, he is presumptively ineffective under the Constitution. If possibly there is no such evidence, then mere innocuous remarks of counsel which cannot and do not influence a trial judge result in equivalent culpability.

The panel considered the remarks of counsel as demonstrating utterly ineffective assistance of counsel. It termed counsel's conduct, or lack thereof, to be "blatant ineffectiveness".

Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983) at 1557. The ineffectiveness "cried out" from a reading of the transcript. Id. Regarding prejudice, it was considered that under any standard, prejudice was "evident" on the face of the record. Id. The actual prejudice was "readily discernible." Id. at 1558. To support this conclusion, the court noted that the jury heard everything the trial judge did but because the trial judge heard more in terms of counsel's remarks, his conclusion of sentence must have been the result of those remarks standing alone.

For something to be so dramatically apparent, it is noteworthy that of the four federal judicial officers who have reviewed this issue, two have found that the claim was just as "clearly" without merit as did the two

on the panel opinion. The district judge stated: "Clearly this claim is insubstantial." Douglas v. Wainwright, 521 F.Supp. at 807. The dissenting judge opined: "Certainly the judge is supposed to impose the death penalty only on the record of the trial and sentencing proceedings." 714 F.2d at 1558. Also, when the claim was weakly presented to the Florida Supreme Court, a unanimous court did not consider "meritorous to any degree the suggestion now made that trial counsel was 'ineffective' because he failed to persuade the trial judge to follow rather than override the jury's recommendation." Douglas v. State, 373 So.2d at 896.

This sharp disagreement on the issue is further emphasized when one remembers that throughout all proceedings, both state and federal.

Douglas only offered his "belief" that he received ineffective assistance of counsel in this particular. We fail to note at any point in any state or federal record the demonstration of even the slightest prejudice which occurred as a result of the assertion of ineffectiveness. Even Douglas has not argued that his lawyer's performance caused the trial judge to fail to follow the jury recommendation. The best he has ever presented in his belief that conduct of counsel might have somehow improperly influenced the sentencing judge.

The Eleventh Circuit noted the differing standards between Washington v Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982), en banc, cert.granted, ___U.S.___, 103 S.Ct. 2451, 76 L.Ed.2d (1983) and United States v. Decoster, 624 F.2d 196 (DC Cir. 1979), en banc, but specifically held that regardless

the burden of proof, Douglas apparently did not have to show anything at all; prejudice to him was presumed. This holding does two things. Firstly, it creates the proposition that Douglas' lawyer was so bad that as a matter of law Douglas was deprived of his right to counsel under the Sixth Amendment. Secondly, it utterly overlooks the role of the trial judge under Florida's law and assumes that a judicial officer may be improperly influenced by counsel in spite of his position as judge and duty under law.

In Washington v. Strickland, the en banc panel rejected the test set forth in the panel majority and instead required that a petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. It was considered that this burden would

eliminate the filing of frivolous or insubstantial claims and at the same time would allow the state to show that if any constitutional error occurred, it was harmless beyond a reasonable doubt.

Here, the Eleventh Circuit relieved Douglas of showing any prejudice whatsoever, much less actual and substantial. Indeed, in footnote 40 of the panel opinion, it is intimated that some mitigating evidence may have existed. This appears to utilize the same kind of "conceivable benefit" test which was specifically rejected in Washington v. Strickland, en banc, referring to United State v. Valenzuela-Bernal, 458 U.S.___, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Additionally, that notion is factually incorrect since Douglas' rap sheet, reflected in the presentence investigation report, shows that he has had

considerable criminal activity during his lifetime. It was, as mentioned above, that particular factor which defense counsel sought to absolutely keep away form the jury's knowledge and consideration.

Here, as in Strickland v. Washington, is the specific question of what the Sixth Amendment requires in a criminal trial. Whether the standard of the Eleventh Circuit is correct or whether any other standard is correct or whether this Court will set forth an entirely different standard is something which necessarily will have direct and equal application to this case. Likewise, as in Strickland v. Washington, supra, several other issues dealing with the interpretation and application of decisions of this Court, the burden and degree of proof when considering the issue of assistance of counsel, and the

function of a federal appellate court with regards to findings of fact by lower federal and state courts are involved. Whatever is decided as to these issues will also have a controlling bearing on this case.

VII

CONCLUSION

For the same reasons that this Court granted certiorari review in Washington v. Strickland, Case No. 82-1554, the Court should accept and decide this case and thus resolve the ever-growing conflict that exists between the highest court of Florida and the Eleventh Circuit Court of Appeals.

Respectfully submitted on this

_____day of November, 1983.

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Howard Virgil Lee DOUGLAS
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and David H. Brierton, Superintendent of Florida State Prison at Starke, Florida, Respondents-Appellees

No. 81-5927.

United States Court of Appeals,

Eleventh Circuit.

Sept. 19, 1983.

Before RONEY and KRAVITCH, Circuit Judges and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Howard Virgil Lee Douglas was convicted by Florida state court of murder in the first degree. In the second phase of a bifurcated trial, the jury unanimously recommended life imprisonment, rejecting imposition of the death penalty. The trial judge, however, found that the murder was "especially heinous, atrocious and cruel," that "no evidence of mitigating circumstances was

produced," and imposed the death penalty. The conviction was affirmed by the Florida Supreme Court in Douglas v. State, 328 So.2d 18 (Fla.) (Douglas I), cert. denied, 429 U.S. 871, 97 S.Ct. 185, 50 L.Ed.2d 151 (1976), reh. denied, 429 U.S. 1055, 97 S.Ct. 770, 50 L.Ed.2d 771 (1977). The Florida Supreme Court affirmed the denial of a subsequent motion for state post-conviction relief but issued a stay of execution. Douglas v. State, 373 So.2d 895 (Fla.1979) (Douglas II). Douglas then petitioned for federal habeas relief pursuant to 28 U.S.C. §2254. The federal district court denied the habeas corpus petition in all respects. Douglas v. Wainwright, 521 F.Supp. 790, 807-08 (M.D. Fla.1981).

We affirm in part and reverse in part and remand.

I. Background

Appellant was convicted of murder of Jesse Atkins. The motive apparently arose from a classic "love triangle" in which Helen Atkins ("Atkins"), wife of the deceased, had been romantically involved with appellant, having lived with him for a year prior to her marriage to Mr. Atkins. She and her husband were frequently separated and Atkins and Douglas maintained contact during that period.

On the afternoon of July 16, 1973, twenty year old Atkins and her husband drove to Bowling Green, Florida to collect belongings from a trailer Atkins rented and from which her eviction was threatened. On the return trip to Fort Green, appellant drove up beside the Atkins and ordered them to pull to the side of the road. Appellant, armed with a rifle, got into their car and ordered

them to proceed according to his directions. During this trip the car became stuck on a back road. All three walked to a nearby mining operation where a man was found who returned with a truck to extricate the car. The three then drove to a wooded area near Brewster, Florida.

Appellant at gun point forced the victim and Atkins to undress and perform sexual acts, and then struck Mr. Atkins on the head with his rifle, shattering the rifle stock. Appellant next fired multiple shots into the victim's head.

According to Atkins, she and appellant drove away in the Atkins' car until it again stalled. Appellant then directed Atkins to engage in sexual activities with him. Following this they walked several miles to where appellant's truck was parked and drove

to the trailer home of Atkins' mother-in-law to pick up her two children. Atkins testified that she did not tell her deceased husband's parents about the murder because of appellant's threats to kill them all. Atkins, Douglas and the children all returned to the scene of the murder where Atkins and Douglas dragged the body into some underbrush and covered it. They then started the Atkins' automobile which Atkins drove away. Douglas followed driving his own truck. Atkins and her children lived with Douglas at her trailer for nine days following the murder, until authorities independently discovered Mr. Atkins' body.

Douglas was indicted on charges of first degree murder, tried by a jury and convicted. At trial, Atkins, as the only eyewitness to the crime, was the

prosecution's key witness. During her testimony, on motion by the state and over the objection of defense counsel, the judge excluded the general public from the courtroom. The families of the defendant, the witness, and the decedent and members of the press were allowed to remain.

At the sentencing phase of the bifurcated trial, the jury recommended imposition of a life sentence. After taking the sentence under advisement for ten weeks, the trial judge issued an order of Judge and Sentence, adjudging appellant guilty and imposing the death penalty. Before imposing sentence the trial judge requested and received a presentence investigation report to be used to identify any mitigating circumstances. The presentence report on which the court relied identified several

prior felony and misdemeanor convictions of appellant. All but one of the felony convictions previously had been invalidated because they were "uncounseled convictions" imposed in disregard of Appellant's right to counsel.

II. Public Trial Issue

Douglas contends that his sixth fourteenth amendment right to a public trial, as applied to the states through the fourteenth amendment, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), was violated by the exclusion of members of the general public from the courtroom during the testimony of Atkins, who was the prosecution's key and only eye witness to the crime. Conceding that the right to a public trial is not absolute and that it must, in some instances, be balanced against other competing societal interests, appellant argues alternatively that even if the exclusion did not violate his public trial right per se, the trial judge's failure to hold a hearing on

the exclusion motion or to make findings as to the necessity for the closure violated appellant's sixth amendment right.

Immediately prior to Atkins' testimony concerning the events leading up to and following the death of her husband, the state moved for the exclusion from the courtroom "of all except necessary Court personnel." Douglas v. Wainwright, 521 F.Supp. 790, 795 (M.D. Fla. 1981). The colloquy between the parties was as follows:

> MR. CAMPBELL: I am making a motion that due to the nature of the testimony of the next witness, Helen Atkins, that the Court order that the Courtroom be cleared of all except necessary Court personnel.
>
> MR. KIRKLAND: The Defense will

object, because she's not a person of young and tender years. There are ladies on the jury that are going to have to hear this and I think she should confront society with her testimony as well.

I think the Defendant has a right to a fair trial and to a public trial.

MR. CAMPBELL: Your Honor, I think that regardless of whether she's a person of young and tender years-I'm not sure how far that goes_____

THE COURT: Let me see you gentlemen up here. (Counsel approached the bench.)

THE COURT: Do you feel that this is so embarrassing to her_____

MR. CAMPBELL: It could be, Your

Honor.

THE COURT: ____do you feel this is embarrassing to her or are you trying to save the women in ____

MR. CAMPBELL: I think its not only embarrassing to her, Your Honor, I think that it's such that I don't see any reason for some of the people in the audience to sit and listen to this sort of testimony, as I've indicated to the jury.

I don't see any reason that anybody ought to hear it unless it's absolutely necessary.

THE COURT: Is [sic] there any members of the Defendant's family in the audience?

MR. CAMPBELL: Yes, Your Honor.

THE COURT: How many?

MR. KIRKLAND: One or two.

THE COURT: Is the Press here?

MR. KIRKLAND: I assume there are members of the Press.

Id. at 795, quoting II Trial Transcript 213-14. The judge then instructed the jury:

THE COURT: Ladies and gentlemen, a motion has been made that the - due to the nature of the testimony as anticipated by the State to be produced - that the Courtroom be cleared of all personnel who are not part of the official actions in this case.

Our Constitution and laws provide for a public trial and this is the right of every individual. I wish to assure the guarantee of a public trial and I will permit members of the family of the Defendant here. ___

MR. CAMPBELL: Then you ought to also permit the members of the family of the deceased.

THE COURT: ___and the members of the family of Jessie William Atkins, Jr. ___

MR. CAMPBELL: ___ and Helen Atkins.

THE COURT: ___ and Helen Atkins and the representatives of the Press. Other than that, I would like everyone else to leave and - until this phase of the case has been completed. (The spectators left the Courtroom.)

Id. at 793-94, quoting II Trial Transcript 214-15.

The United States Supreme Court has never specified whose presence, at a minimum, must be allowed to ensure a defendant a constitutionally guaran-

teed public trial.[1] But see In re Oliver, 333 U.S. 257, 259, 68 S.Ct.499, 500, 92 L.Ed. 682 (1948) (conviction for contempt with only judges and perhaps staff members and prosecutor present violates right to public trial). However, Justice Harlan, in his concurring opinion in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), stated:

> Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. A fair trial is the objective, and "public

1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...." Amendment VI, United States Constitution.

trial" is an institutional safeguard for attaining it.

Thus, the right of "public trial" is not one belonging to the public, but one belonging to the accused and inhering in the institutional process by which justice is administered. Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who

> wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Id. at 588-89, 85 S.Ct. at 1662-63 (citations omitted).

Beyond this, even though the Supreme Court has in several cases addressed the contours of the first amendment right of the public and press to attend criminal proceedings, Globe Newspaper Co. v. Superior Court, ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed. 2d 248 (1982); Richmond Newspaper, Inc. v. Commonwealth of Virginia, 448 U.S. 555, 100 S.Ct. 2814 65 L.Ed.2d 973 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the Court has not spoken on the proper approach to issues raised when a criminal defendant alleges his

sixth amendment right to a public trial has been violated. We interpret the Court's analysis in the first amendment right of access cases, however, as helpful to the analysis of a claim of deprivation of a sixth amendment right to a public trial. See Globe Newspaper Co. v. Superior Court, supra; Richmond Newspapers, Inc. v. Virginia, supra; Gannett Co. v. DePasquale, supra.

In Aaron v. Capps, 507 F.2d 685, 687-88 (5th Cir. 1975), the only binding precedent in this circuit on the issue before us,[2] the court's decision that the defendant was not deprived of a public trial was based primarily on the fact that, in the particular cir-

2. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) this circuit adopted as precedent the decisions of the former Fifth Circuit.

cumstances, the presence of certain persons sufficed to preserve the public nature of the proceedings. In the words of the court: "[T]he fact that some members of the public were barred from the courtroom does not necessarily mean that a denial of a public trial has occurred; the 'decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial'." Id. at 687, quoting Levine v. United States, 362 U.S. 610, 616-17, 80 S.Ct. 1038, 1042-43, 4 L.Ed.2d 989 (1960).

In Aaron, the general public was excluded during a rape trial.[3] The

3. The exclusion order was made pursuant to Article VI, Section 169 of the Alabama Constitution of 1901, which was repealed in 1973, and read: "In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude

[Footnote 3 Cont.]

from the courtroom all persons, except such as may be necessary to the conduct of the trial."

relatives of both the defendant and the victim, the defendant's clergyman, courtroom personnel, all attorneys and the press were allowed in the courtroom. Id. The court held there was no violation of the public trial right because: "some members of the public were admitted; the courtroom was at least three-fourths full; the transcript of the trial became public record. Particularly important is the fact that the news media were admitted. The published reports of the trial were lengthy and complete. The defendant's relatives and clergymen were present to provide moral support and comfort to the accused." Id. at 687-88. The court determined that the presence of

these persons, combined with the actual press coverage of the trial, adequately served the purposes underlying the public trial right, id., and the " 'defendant received[d] every safeguard insured by a trial open to the general public.' " Id. at 688, quoting Note, 45 Mich.L.Rev. 474, 479 (1937).

Relying on Aaron v. Capps, therefore, we should consider whether in the proceedings in question the purposes underlying the constitutional mandate of a "public" trial are met, even though certain persons are not present or allowed to be present. In other words, the practical impact of the partial closure must be evaluated. Id.

[1] Prior to the recent Supreme Court decisions on the first amendment

right of access, several of the United States Courts of Appeals decided that a defendant's right to a public trial was not violated when the closure was partial, in that family members and/or the press were allowed to remain, and the exclusion of the public was narrowly limited in scope to a legitimate purpose for which it is ordered. United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 694-96 (7th Cir. 1977) (to protect dignity of witness in rape trial); United States v. Eisner, 533 F.2d 987, 993-94 (6th Cir.), cert denied, 429 U.S. 919, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976) (to protect witness with fear of testifying in public); United States ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969) (to protect witness afraid of testifying); United

States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom. Orlando v. Follette, 384 U.S. 1008, 86 S.Ct. 1961, 16 L.Ed.2d 1021 (1966) (to protect witnesses from intimidation); Geise v. United States, 262 F.2d 151, 155 (9th Cir. 1958), cert. denied, 361 U.S. 842, 80 S.Ct. 94, 4 L.Ed.2d 80 (1959) (to protect child witnesses in rape trial from embarrassment). Others held that even where the closure is total and the press and family members, as well as the general public, are excluded, but only for a limited, justifiable purpose and period of time, the public trial guarantee is honored. United States v. Hernandez, 608 F.2d 741, 747-48 (9th Cir. 1979) (to protect witness and his family where safety threatened); United States ex rel. Lloyd v.

Vincent, 520 F.2d 1272, 1274 (2d Cir.), cert. denied. 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975) (to preserve confidentiality of undercover agents in narcotics case); Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539-42 (2d Cir. 1974) (to protect from disclosure of trade secrets). But see United States ex rel. Bennett v. Rundle 419 F.2d 599, 607-08 (3d Cir. 1969) (writ of habeas granted because exclusion of public did not meet "standard of strict and inescapable necessity" where jury had retired from courtroom for hearing on suppression of evidence and only purpose of exclusion was to protect the defendant); United States v. Kobli,172 F.2d 919 (3d Cir. 1949) (conviction reversed where exclusion of public for protection of public morals swept too broadly; ex-

clusion of only youthful spectators would have been appropriate); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944) (conviction reversed where only press, necessary courtroom personnel and family members allowed throughout the trial).

Thus the law is clear that the right to a public trial is not absolute and must in some instances give way to other substantial interests essential to the fair administration of justice. United States v. Hernandez, 608 F.2d at 747; United States ex rel. Latimore v. Sielaff, 561 F.2d at 694; United States v. Eisner, 533 F.2d at 993; United States ex rel. Lloyd v. Vincent, 520 F.2d at 1274; Geise v. United States, 262 F.2d at 156-57. See Aaron v. Capps, 507 F.2d at 687; Lacaze v. United States, 391 F.2d 516, 521 (5th

Cir. 1968). See also Note, The Accused's Right to a Public Trial, 42 Notre Dame Lawyer 499, 503-04 (1967); Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L.Rev. 1138, 1144-47 (1966).

[2] The recent Supreme Court right of access cases make equally clear, however, that one who seeks to justify closure of a criminal trial carries a heavy burden. Globe Newspaper Co. v. Superior Court, ___U.S. at ___, 102 S.Ct. at 2620 (where the state obtains exclusion of the public and the press and press asserts a first and fourteenth amendment right of access to criminal trials, closure must be justified by "a compelling governmental interest, and [be] narrowly tailored to serve that interest"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at

581, 100 S.Ct. at 2829 (opinion of Burger, C.J., White & Stevens, JJ.) (where court, without objection from prosecutor or defendant, seeks closure and press asserts first and fourteenth amendment right of access, closure is unjustified "[a]bsent on overriding interest articulated in findings"); id. at 598, 100 S.Ct. at 2839 (Brennan & Marshall, JJ., concurring in judgment); id. at 600 & n. 5, 100 S.Ct. at 2840 & n. 5 (Stewart, J., concurring in judgment). See also Newman v. Graddick, 696 F.2d 696 at 801 (11th Cir. 1983) ("compelling governmental interest" and findings required to close civil proceeding relating to release or incarceration of prisoners). It would be extremely ironic to require less of a showing when the basis for opposing closure is a defendant's explicit sixth

amendment right to a public trial than when the interest asserted is the press' unexplicit first amendment right of access to criminal trials. Equally ironic would be a holding that when a state seeks closure it has a lesser burden than a defendant who seeks closure to protect his right to a fair trial. See, e.g., United States v. Powers, 622 F.2d 317, 324 (8th Cir. 1980) (where defendant seeks closure to ward off undesired publicity and state objects, defendant must show that closure is justified by strict and inescapable necessity). Cf. Nebraska Press Association v. Stuart, 427 U.S. 539, 553-65, 96 S.Ct. 2791, 2800-05, 49 L.Ed.2d 683 (1976) use of prior restraint of press to protect defendant's right to fair trial prohibited where alternatives to restraint of

press will suffice).

What emerges from a review of these cases is the conclusion that the strength of the reason for the closure is another factor properly to be considered in determining whether the right to a public trial has been violated.[4]

4. In Aaron v. Capps, supra, little attention was devoted to the sufficiency of the justification for the closure. There, however, as noted supra n. 3, the closure was ordered pursuant to a state constitutional provision, the federal constitutionality of which was not directly challenged. Subsequent to the decision in Aaron v. Capps, the right of access decisions of the Supreme Court and of this circuit have made clear that the reason for the closure is a critical factor that must be considered in order to justify closure. Cf. United States v. Juarez, 573 F.2d 267, 281 (5th Cir. 1978) (exclusion of defense witnesses during closing arguments and jury charge, pursuant to Fed.R.Evid. 615 "was reasonable" due to concern that witnesses might be called at a second trial and given these proceedings were totally open to the general public).

[3-5] Whether a particular proceeding therefore is sufficiently "public" to pass constitutional muster "must turn on the particular circumstances of the case,"[5] Aaron v. Capps, 507 F.2d at 687. In particular the court must analyze, in light of those purposes of the public trial guarantee which the defendant alleges were undermined, see Gannett Co. v. DePasquale, 443 U.S. at 383, 99 S.Ct. at 2907; Douglas v. Wainwright, 521 F.Supp. at

5. As expressed by another federal court: "Ordinarily the Sixth Amendment precludes the general exclusion of the public from the trial of a case over the objection of the defendant...[H]owever, ...although the Constitutional right of public trial is a substantial one, the term 'public' is a relative one, and its construction depends upon various conditions and circumstances.." United States v. Geise, 158 F.Supp. 821, 824 (D. Alaska 1958), quoted with approval and aff'd, Geise v. United States, 262 F.2d at 156-57.

795, the scope and practical impact of the partial closure, Aaron v. Capps, 507 F.2d at 687-88, and the strength of the reason for the closure. See Note, The Accused's Right to a Public Trial, 42 Notre Dame Lawyer 499, 499-504 (1967). This approach allows a distinction to be drawn between some proceedings where closure is partial, in that certain members of the public are allowed to remain, and those in which total exclusion is ordered. Total exclusion is proscribed absent a most compelling justification. Cf. Globe Newspaper Co. v. Superior Court, supra 102 S.Ct. at 2620. In other cases, where neither all members of the public nor the press are excluded, the "public" nature of the proceedings may be retained sufficiently so that a lesser justification for the partial

closure will suffice to avoid constitutional deprivation. In those partial closure cases where the interests underlying the public trial right are not protected, however, a compelling justification for the closure, as in total closure cases, must be shown.

A. Purposes of The Public Trial Guarantee

The Supreme Court in Gannett Co. v. DePasquale, 443 U.S. at 383, 99 S.Ct. at 2907, reviewed the interests protected by the public trial right: "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses' to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." See also Globe Newspaper Co. v. Superior Court,

___U.S. at ___, 102 S.Ct. at 2619-20; Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569-73, 100 S.Ct. at 2823-25 (Burger, C.J., White & Stevens, JJ.); id. at 593-97, 100 S.Ct. at 2836-38 (Brennan & Marshall, JJ., concurring in judgment). In the habeas proceeding below, the district court accurately summarized the purposes underlying the right which potentially are implicated in this case: "(1) [protection from] the dangers of secret proceedings (2) open proceedings give notice to the world of the details of the case, thus encouraging potential and previously unidentified witnesses to volunteer their knowledge, and (3) the likelihood that more truthful testimony will result if given in open court in the presence of the public." Douglas v. Wainwright, 521 F.Supp. at

Appellant does not argue that the trial was in any way "secret" in the sense of being a "Star Chamber" proceeding;[6] the exclusion order was narrowly tailored to apply during the testimony of one witness only, some members of the public were in attendance, the press was allowed to be present and the transcript of the testimony was made public, precluding any basis for a claim that the dangers of secret proceedings were present.[7] Thus, our analysis must be undertaken within

6. Even Justice England who dissented on this issue in the Florida Supreme Court and would have reversed Douglas' conviction for violation of the public trial right said: "We do not have here the classic nonpublic trial which our jurisprudence has abhorred since the nation was founded. I agree with the majority there was no 'Star Chamber' or 'Inquisitorial' proceeding..." Douglas I, 328 So.2d 18, 22 (1976) (England, J., dissenting).

7. We make no ruling as to whether the dangers of a secret proceeding

[Footnote 7 Cont.]

could be present in the event of a more broad exclusion order, where a partial closure is in effect during more of the trial than the testimony of one witness, where total closure is ordered, or where the transcript is not made public.

the framework of the other purposes of the public trial right which the appellant asserts and the lower court determined were relevant here: encouragement of unidentified witnesses to come forward and the likelihood of more truthful testimony absent the exclusion. If, on the particular facts of this case, Aaron v. Capps, 507 F.2d at 687, these interests were adequately protected by the nonexclusion of the press and family members, then a less "compelling" justification will suffice for the proceedings to qualify as "public" for purposes of the sixth amendment guarantee.

Here, given that Atkins was the sole eyewitness to the murder and the witness on whose testimony the judge relied in finding the one aggravating circumstance used to justify imposition of the death penalty, her testimony was crucial to say the least. The record reveals that the witness had remained with the appellant for nine days after the death of her husband. Only when the body was discovered did Atkins notify anyone of the murder. Appellant did not testify at trial, but his attorney(s) at trial, on appeal, and in the habeas proceedings have suggested indirectly that Atkins was herself implicated in the crime. Although there is no direct evidence in the record to support this, the possibility remains that some unidentified person may have

witnessed events relating to the killing but, for a variety of imaginable reasons (e.g., a desire not to get personally involved) had not come forward at the time of trial. If, however, such a person had attended the trial and heard testimony being given by Atkins which was contrary to what he had witnessed, he may have been compelled to come forward. This is the type of situation against which protection is to be afforded by the public trial right and which is alluded to in the second purpose of the right identified by the court below.

The third purpose of the public trial right pinpointed by the lower court, inducing truthful testimony by the witness, also is implicated in this case. Atkins may have revealed to another person a version of the events

of the day of and the week following the killing inconsistent with her testimony at trial. Even if such a revelation would constitute excludable hearsay, the knowledgeable member of the public could have informed defense counsel of any inconsistency. Cross-examination, therefore, could have been enhanced.

The foregoing scenarios are speculative and hypothetical only, and are not the only ones imaginable. There is not necessarily any way a defendant denied the right to a public trial could prove the validity of such hypotheses. For precisely this reason, the federal courts consistently have refused to require a defendant to prove prejudice once a violation of the right to a public trial is shown. United States v. Hernandez, 608 F.2d 741, 747

(9th Cir. 1979); Martineau v. Perrin, 601 F.2d 1196, 1198 (1st Cir. 1979); United States v. Eisner, 533 F.2d 987, 993 (6th Cir. 1976); United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969); Davis v. United States, 247 F. 394, 398 (8th Cir. 1917). It is "the settled rule of the federal courts that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings." Levine v. United States, 362 U.S. 610, 627 n. 1, 80 S.Ct. 1038, 1048 n. 1, 4 L.Ed.2d 989 (1960) (Brennan & Douglas, JJ., dissenting from a finding that failure to object to closure waives right to public proceedings). "To require proof of [prejudice] by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his consti-

tutional right has made it impossible for him to learn." United States ex rel. Bennett v. Rundle, 419 F.2d at 608; see also, United States v. Hernandez, 608 F.2d at 747 ("To require the accused to establish prejudice because of the exclusion would impair or destroy the safeguard").

B. Scope and Practical Impact of the Exclusion

Having identified the interests in a public trial that were implicated by the partial closure during Atkins' testimony, we proceed to analyze, in light thereof, the scope and practical impact of the closure.

The partial exclusion was limited to the testimony of one witness only. See Globe Newspaper Co. v. Superior Court, ___ U.S. at ___, 102 S.Ct. at 2620 (closure order must be narrowly tailored). As discussed above, how-

ever, that one witness was central to the prosecution's case. Moreover, the order required exclusion of all of the general public, not only youthful spectators. See United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949) (conviction reversed where exclusion of public, not only youthful spectators, for protection of public morals swept too broadly).

In Aaron v. Capps, 507 F.2d at 687, the practical impact of the partial closure was mitigated by virtue of "the fact that the news media were admitted [and] [t]he published reports of the trial were lengthy and complete." The record in Aaron v. Capps also reflected that even though the public at large was excluded, "the courtroom was three-fourths full...." Id.

[6, 7] All that the public trial

guarantee affords to the defendant is that the public be allowed to be present, not that the public actually be present. See Estes v. Texas, 381 U.S. at 588-89, 85 S.Ct. at 1662-63 (Harlan, J., concurring). Simply allowing the press to be present, however, does not serve the same purpose as allowing the public to be present, for the press is not the public, and the Sixth Amendment guarantees a public trial. It is only as a fiduciary for the public that the presence of the press mitigates against what otherwise would be a closed, non-public trial. Thus, in certain cases, the presence of the press has been held to safeguard the public trial right, the press serving as a fiduciary for the public, not because they were allowed to be present, but because they were present and

reported the trial activities and informed the public of that which the public was unable to experience firsthand because of the closure order. Aaron v. Capps, 507 F.2d at 687-88. It does not follow logically that because the Sixth Amendment requires only that the public be allowed to be present that where the public is excluded but the press is allowed to remain the Sixth Amendment right is not infringed. If the press is not actually acting as a fiduciary for the public, then a partial closure is no different than an absolute closure, requiring a most "compelling interest" to justify it. The determination of the degree of press coverage, therefore, is necessary to a determination of the extent to which the public trial was infringed. These assess-

ments in turn are relevant to the strength of the governmental interest essential to justify the closure order.

During the Motion to Stay Hearing in the court below, the district judge stated: "I am concerned as a result of one contention which was raised, and that is that the principal witness may not have testified to some of the things she testified to if she had had to testify in the presence of the public."[8] He concluded, however, that one of the purposes underlying the sixth amendment, that a witness face the defendant in front of her peers, "was satisfied... when this witness, the principal witness, was required to testify in the presence of the press and, in this instance, the press,

8. Transcript of July 24, 1979 Motion to Stay Hearing at 111.

in my judgment, was the saving factor, being present, because as might be expected, they published it."[9] Likewise, in the opinion denying habeas relief, the district court stated: "Certainly the newspaper reporters present guaranteed that there was no secret trial and gave notice of the trial details to the community." Douglas v. Wainwright, 521 F.Supp. at 795.

[8] While there is little evidence to support the conclusion that the press was present and reported the details to the community, we cannot say the finding is clearly erroneous.[10] In response to the court's inquiry at

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9. Id. at 112 (emphasis added).

10. At the Motion to Stay Hearing the district court also stated: "[I]n view of the fact that the press was allowed to be present and there was no direction to the press or attempt to instruct the press about which they might or might not publish, and it could be

[Footnote 9 Cont.]

assumed, and I think that this is an assumption that can be safely made, that the press did publish something about this. Nothing in the record about it." Transcript of July 24, 1979 on to Stay Hearing at 110-11 (emphasis added)

While any party seeking closure of a criminal proceeding, here the state, must carry the burden of justifying the need for closure in the first instance, in a habeas proceeding the burden of proof is on the habeas petitioner to show why federal post-conviction relief should be granted. 28 U.S.C. § 2254. Appellant has given us no basis for finding clearly erroneous the district court's assumption that the press was present and reported the details of the testimony to the public.

the time of the motion for exclusion, defense counsel stated: "I assume there are members of the Press [present]."[11] Appellant does not now argue that the press was not present or did not report the testimony.[12]

11. Douglas v. Wainwright, 521 F. Supp. at 795, quoting II Trial Transcript at 214.

[9] The presence of the press and family members during Atkins' testimony helps mitigate any undermining of the purposes of the public trial right that are implicated in this case. Press coverage reduces the danger that an unidentified witness to any of the events surrounding the crime would be uninformed of any perjured testimony

12. The actual presence of the press is significant in that it is a major factor in distinguishing a partially closed proceeding from one that is totally closed which requires a most "compelling interest" as a justification. See, e.g., Globe Newspaper, Inc. v. Superior Court, ___U.S. at ___, 102 S.Ct. at 2620.

This is not to say that the presence of the press is the only method by which partially closed proceedings may be distinguished from those that are totally closed. For instance, whether or not the record has been made public and whether or not persons in addition to family members but less than the general public are allowed to remain are also factors to be considered. See Aaron v. Capps, 507 F.2d at 687.

by Atkins. See discussion supra slip op. at 4955, at ___. Likewise, Atkins' awareness of the presence of the press and all family members minimizes the risk that the witness would alter her testimony when the proceeding was partially closed as opposed to completely open. See text supra slip op. at 4955, at ___.

Accordingly, as in Aaron v. Capps, 507 F.2d at 687-88, the practical impact of the closure here was not a kind presented when a proceeding is totally closed to the public. Cf. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); Caudill v. Peyton, 368 F.2d 563 (4th Cir. 1966).

C. The Reason for the Exclusion

[10] As noted above, also crucial to a determination of whether the right to a public trial is violated is

the reason for the closure. A substantial reason for even a partial closure is required. The Florida Supreme Court on direct appeal from Douglas' conviction stated in its review of the public trial issue that: "The basis of the motion was that the nature of the testimony was so embarrassing that there was no reason that anybody should hear it unless necessary." Douglas I, 328 S.2d at 20. The court concluded that exclusion of the public for the purpose of protection of "public morality" does not present a violation of the right to a public trial. Id. at 20-21, quoting Robertson v. State, 64 Fla. 437, 60 So. 118 (1912).

[11] In the habeas proceedings below, contrary to the state court finding that the reason for the exclu-

sion was protection of public morality, the district court proceeded on the assumption that the purpose of the partial closure was "avoiding additional and unnecessary insult to the dignity of the witness." Douglas v. Wainwright, 521 F.Supp. at 796.

Pursuant to the powers and duties granted to a federal habeas court under 28 U.S.C. § 2254, the federal court is required to afford a state court finding of fact a "presumption of correctness," Sumner v. Mata, 449 U.S. 539, 549, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981), "unless the applicant shall establish or it shall otherwise appear ..." that one of the conditions set forth in § 2254(d)(1)-(8) is present.[13]

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13. 28 U.S.C. § 2254(d) reads in its entirety:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas cor-

[Footnote 13 Cont.]

pus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State Court hearing;

(2) that the factfinding procedure employed by the State Court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State Court,

in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or

[Footnote 13 Cont.]

> unless the court concludes pursuant to the provisions of paragraph numbered (8) that the records in the State court proceeding considered as a whole, does not fairly support such factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (emphasis supplied). If none of the istuations enumerated in § 2254(d) is presented, a habeas court may substitute its factual findings for that of the state court only if the habeas petitioner established "by convincing evidence that the factual determination by the state court was erroneous." Id. Even if one or more of the conditions is presented, a state court finding of fact still may be overturned only if a finding to the contrary is proved by a "preponderance of the evidence." Sumner v. Mata, 449 U.S. at 551, 101

S.Ct. at 771. In assessing a petitioner's claim, therefore, the habeas court must review the record and determine if the "presumption of correctness" applies, and, if so, whether or not the presumption has been rebutted, or, if not, whether a contrary finding is supported by a preponderance of the evidence. Id. at 547-51, 101 S.Ct. at 769-71. In the instant case, the district court failed in this duty.

[12, 13] Normally when faced with such an error we would remand to the district court for an application of the correct analysis. In the instant case, however, we have before us the identical record as did the district court in the initial proceedings and as would the lower court on remand. On the face of the record

it is apparent that the state trial judge was presented with two asserted reasons for the closure: protection of the public morality and protection of the witness from embarrassment. See Douglas v. Wainwright, 521 F.Supp. at 795, quoting II Trial Transcript 213-14. See also IV Trial Transcript at 727. The Supreme Court of Florida ruled that one reason, protection of public morality, was sufficient to justify the closure. Douglas I, 328 So.2d at 20-21. It did not reach the question of whether there was any other reason for the closure, although the dissenting justice pointed out that undoubtedly the trial judge primarily was motivated by a desire to protect Atkins from embarrassment. Id. at 23 (England, J., dissenting). Against this background, while we admonish the district courts that in habeas proceedings findings of

fact apparently contrary to those made by the state court should be explained and justified under § 2254 and Sumner v. Mata, we conclude that the district court was not clearly erroneous in finding that the primary reason for the partial closure was protection of the witness from embarrassment.

[14] Further, although we doubt that protection of the morality of the general public could qualify as a sufficient reason for even a partial closure, United States v. Kobli, 172 F.2d 919 (3d Cir.1949), we hold that the district court did not err in concluding that protection of the witness was sufficiently compelling to justify this partial closure, where, as we have held here, the partial closure does not undermine the purposes underlying the public trial right. See United States ex rel. Latimore v. Sielaff, 561 F.2d 69 1, 694-

96 (7th Cir. 1977); Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975); Geise v. United States, 262 F.2d 151-155 (9th Cir. 1958), cert. denied, 361 U.S. 842, 80 S.Ct. 94, 4 L.Ed.2d 80 (1959).

Hence, we AFFIRM the denial of habeas relief on the public trial issue. [14]

D. The Need for a Hearing and Findings

[15]. Appellant also contends that, even if no actual deprivation of the public trial right occurred, error of constitutional dimension was committed when the state court failed to hold a hearing on the exclusion order and arti-

14. Appellant also argues that exclusion of the public during Atkins' testimony placed undue emphasis on her testimony, highlighting the importance of what she had to say. Such a danger however is inherent in any closed or partially closed proceeding. Appellant's trial counsel sought no cautionary instruction to negate this risk. Given our holding that appellant was not deprived of a public trial, we also find this argument without merit.

culate in findings the reason for the partial closure. The failure to give interested parties an opportunity to be heard and to state reasons for closure has rendered closure orders constitutionally infirm in the cases implicating the press' and public's right of access to criminal trials. Globe Newspaper Co. v. Superior Court, __ U.S. at ___, 102 S.Ct. at 2622 n. 5; Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581, 100 S.Ct. at 2829 (plurality opinion); id. at 598, 100 S.Ct. at 2839 (Brennan & Marshall, J.J., concurring in judgment); id. at 600 & n. 5, 100 S.Ct. at 2840 & n. 5; (Stewart, J., concurring in judgment). See also Newman v. Graddick, supra, 696 F.2d 796 at 801, 803. Cf. Gannett Co. v. DePasquale, 443 U.S. at 376, 99 S.Ct. at 2903 (where hearing held and findings made as to need for exclusion, no error in closing pretrial

hearing to the press). Certainly these procedural safeguards are no less crucial when closure is challenged as a violation of the defendant's sixth amendment right. Accordingly, we hold that an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests an opportunity to be heard.

[16,17]. In the instant case, however, though defense counsel did object generally to the partial closure,[15] he failed to object in the trial court to the absence of a hearing or findings. The failure to object contemporaneously or to request a hearing and findings deprived the state court of the opportunity to correct the error. Appellant makes no attempt to justify, under the "cause and prejudice" standard of Wain-

15. II Trial Transcript at 213.

wright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the failure to make specific objection. Therefore appellant's right to an opportunity to be heard in and to findings from the state court has been waived.[16]

16. We emphasize that even in the absence of a specific objection or a request for a hearing and findings the better course for the state court to follow is sua sponte to hold the hearing and make findings. Such findings should include the reason for the closure, the evidence that supports the need for the closure, the number of persons excluded and the number allowed to remain, and the presence or absence of the press. This procedure will facilitate both direct and federal habeas review. The federal courts in habeas proceedings accord appropriate state court findings the "presumption of correctness." Sumner v. Mata, 449 U.S. at 549, 101 S.Ct. at 770. Thus, the existence of such findings may alleviate the need for an evidentiary hearing in federal habeas court, see 28 U.S.C. § 2254(d), and the interests of finality in state criminal justice proceedings will be served. See Engle v. Isaac, 456 U.S. 107, 126, 128, 102 S.Ct. 1558, 1570 1571, 71 L.Ed.2d 783, 800, 801 (1982). Sumner v. Mata, 449 U.S. at 549-50, 101 S.Ct. at 770; Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508,

[Footnote 16 continued]
53 L.Ed.2d 594 (1977).

III. Witherspoon Issue

Appellant contends that the exclusion for cause of three members of the jury venire violated the Supreme Court mandate in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In Witherspoon the court established that, in order to protect a defendant's right to be tried by a jury drawn from a cross-section of the community, members of the venire may not be excused for cause simply because they are conscientiously, religiously or morally opposed to the death penalty. "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id.

at 522, 88 S.Ct. at 1777 (footnote omitted). Rather, venirepersons may be excused for cause based on conscientious objection only if they indicate "unambiguously," id. at 515 n. 9, 88 S.Ct. at 1773 n. 9, that their views on the death penalty "would prevent them from making an impartial decision as to the defendant's guilty," id. at 513, 88 S.Ct. at 1772, or "that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Id. at 514, 88 S.Ct. at 1772. The court below rejected appellant's Witherspoon claims on the merits.

We, however, do not reach the merits of appellant's contention because appellant failed to raise the Witherspoon issue on direct appeal and in state post-conviction proceedings; the

issue was raised for the first time since objection was made at trial in the federal habeas proceeding.

[18,19] Florida Rules of Criminal Procedure 3.850[17] has been interpreted by the Florida courts as barring the consideration of claims in state post-conviction relief proceedings that could have been but were not raised on direct appeal in the state courts. Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Hargrave v. Wainwright, 388 So.2d 1021 (Fla.1980); Johnson v. State, 390 So.2d 1234 (Fla.App.1980). See also Alvord v. State, 396 So.2d 184, 191 (Fla.1981);

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17. Florida Rule of Criminal Procedure 2.850 reads in pertinent part: "An application for writ of heabeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced

[Footnote 17. continued]

him, or thatsuch court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his decision."

Pittman v. State, 401 So.2d 934 (Fla. App.1981); Savino v. State, 397 So.2d 1236 (Fla.App.1981); Roth v. State, 385 So.2d 114 (Fla.App.1980). This court in Ford v. Strickland, 696 F.2d 804 at 815-816 (11th Cir.1983), held that, given this interpretation of Rule 3.850, petitioner was precluded from challenging admission of a confession for the first time in federal habeas proceedings unless the "cause and prejudice" standard of Wainwright v. Sykes was met.[18]

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18. Even though the "cause and prejudice standard of Wainwright v. Sykes was originally developed in the context of a procedural default at trial, this circuit has applied the Sykes rationale in cases involving a procedural default in the course of a direct

[Footnote 18. continued]

appeal from a state court conviction Ford v. Strickland, supra, at 815-16; Huffman v. Wainwright, 651 F.2d 347 (5th Cir.1981); Evans v. Maggio, 557 F.2d 430, 433-34 (5th Cir.1977). We are bound by these rulings.

Douglas' failure to raise the Witherspoon issue on direct appeal or in Florida post-conviction relief proceedings[19] thus prevents him from raising the claim in federal habeas proceedings unless he establishes cause for the failure and actual prejudice resulting from the forfeiture.[20] See United States v. Frady,

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19. If a petitioner failed to raise a claim on direct appeal but raised it in post-conviction proceedings and the state court ruled on the merits, the federal court may proceed to the merits of the claim without inquiring as to the existence of cause and prejudice. Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir.1980), cert. denied, 450 U.S. 753, 101 S.Ct. 1413, 67 L.Ed.2d 380 (1981).

20. In Ford v. Strickland, supra, 696 F.2d 804 at 816 this court stated that a petitioner will be precluded from

[Footnote 20. continued]

raising a claim for the first time in federal habeas proceddings if no "cause and prejudice" is shown under the standards of Wainwright v. Sykes, or if petitioner deliberately has bypassed the state court procedure under the test of Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). A review of the language and impact of Wainwright v. Sykes shows, however, that where the "cause and prejudice" standard is applicable the deliberate bypass test is displaced. Wainwright v. Sykes, 433 U.S. at 87, 97 S.Ct. at 2506 ("cause and prejudice" is a narrower," i.e. more stringent, standard than deliberate bypass and the Court "reject[ed]" the latter standard). See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1572-73, 71 L.Ed.2d 783 (1982) (where there is a deliberate bypass of state courts, even if the attorney perceived that raising the claim in state court would have been futile, the "cause" standard of Wainwright v. Sykes cannot be met). Where there has been a deliberate bypass the "cause" standard can never be met and review will be barred; but absence of "cause" may be found in circumstances short of deliberate bypass. Ford v. Strickland, supra, at 816. Thus, deliberate bypass is subsumed in the "cause and prejudice" analysis. Cf. Arnold v. Wainwright, 516 F.2d 964, 967 (5th Cir. 1975) ("cause" standard of Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), percursor of Wainwright v. Sykes, displaced use of deliberate bypass standard), cert. denied,

[Footnote 20. continued]

426 U.S. 908, 96 S.Ct. 2230, 48 L.Ed.2d 833 (1976); Rivera v. Wainwright, 488 F.2d 275 (5th Cir.1974) (same). See also Hockenbury v. Sowders, 620 F.2d 111, 112-13 & n. 1 (6th Cir.1980), cert. denied, 450 U.S. 933, 101 S.Ct. 1395, 67 L.Ed.2d 367 (1981).

456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

[20,21] "Cause and prejudice" is a conjunctive standard, both prongs of which must be satisfied by the appellant before this court is free to ignore the procedural default and hear the merits of appellant's claim. Engle v. Isaac, 456 U.S. at 134 n. 43, 102 S.Ct. at 1575 n. 43, 71 L.Ed.2d at 804 n. 43. Appellant presents no argument that the failure to raise the Witherspoon issues on appeal was justified by cause; nor in the opinion of this court, does any sufficient argument exist. The Witherspoon

issues were certainly not novel ones, as Witherspoon was decided in 1968, several years before appellant's trial. Indeed, as evidence by timely objections during the voir dire, trial counsel was aware of the issues. Appellant argues only that grave prejudice resulted from the alleged Witherspoon violations. Even if the prejudice prong of the Wainwright v. Sykes test were satisfied, appellant fails to meet the dual standard of prejudice and cause. Accordingly, a federal habeas court is not free to decide the merits of the Witherspoon issues.[21] For this reason, the judgment of the district court denying habeas relief on this claim is AFFIRMED.

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21. We note that, even if Witherspoon were violated, appellant could not have been prejudiced by any such violation, at least as to sentencing, because the jury recommended life imprisonment. Thus, any Witherspoon error in the jury selection must have been harmless.

IV. Consideration of Prior Invalid Convictions

Appellant next argues that the Florida Supreme Court, in reviewing the trial judge's imposition of the death sentence, improperly relied on several prior invalid convictions in affirming the death sentence. Appellant contends that such use violated his right to meaningful, independent appellate review deemed necessary to the capital sentencing process under Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913, reh. denied, 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158 (1976) and state supreme court decisions interpreting the Florida statute, e.g., Songer v. State, 322 So.2d 481, 484 (Fla. 1975); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Convictions of Douglas for grand larceny, three escapes, two breakings

and enterings and one forgery were presented in a presentence investigation report specifically requested and used by the trial judge in his search to find mitigating evidence. Appellant and appellee are in agreement that all of these convictions, except the one for forgery, previously had been vacated under the authority of United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), because appellant was not represented by counsel. Accordingly, these uncounseled convictions must be treated as nullities.[22] The state concedes this, but, in support of its argument that use of the convictions deprived appellant of no consti-

22. The record does not reveal specifically the procedural context in which these convictions were vacated. See Record at 748-50.

titutional rights, it relies on the fact that the trial court was aware at sentencing that some of the convictions were uncounseled and restricted its use of them accordingly. The trial court in its findings of fact specifically stated: "The presentence investigation report was considered only in light of its failure to reflect mitigating circumstances." [23] This statement was repeated by the judge at the hearing on

23. Douglas v. Wainwright, 521 F. Supp. at 793, quoting II Trial Transcript at 759.

Fla.Stat.Ann. § 921.141(3) specifically requires consideration of mitigating circumstances before imposition of the death penalty:

(3) Findings in support of sentence of death.-Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in

[Footnote 23 Cont.]
subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

the motion for state post-conviction relief. [24]

Appellant does not contend that the trial court used the invalid convictions for any purpose other than that stated, but argues that use of the invalid convictions by the Florida Supreme Court violated the right to meaningful

24. Transcript of July 17, 1979 Hearing on Motion for Post Conviction Relief at 7.

appellate review. Although appellant's brief is less than clear as to what specific rights he claims were violated, it does identify two issues of constitutional dimension that are embodied in this one claim.

The one issue incorporated in appellant's argument is that under Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977), appellant has a right not to have his "death sentence rest[ ] on an erroneous factual predicate," and that but for use of the invalid convictions some mitigating circumstance would have been found. In the brief on appeal to this court, appellant's counsel state: "By considering appellant's prior invalid convictions it prevented the trial court and the Florida Supreme Court from finding 'the defendant has no significant his-

tory of prior criminal [activity]' as a mitigating factor." [25]

In Gardner the trial judge in imposing the death penalty relied on a presentence report, parts of which were deemed confidential and not revealed to defense counsel. The Florida Supreme Court affirmed the death sentence without reviewing the confidential portion of the presentence report. A plurality of the Untied States Supreme Court held that the trial court's failure to provide counsel access to the report violated due process. Gardner v. Florida, 430 U.S. at 362, 97 S.Ct. at 1206.[26]

25. Appellant's Brief at 23, quoting Fla. Stat.Ann. § 921.141(6)(a).

26. Justice White concurred on the basis that the procedure failed to meet the "'need for reliability'" which the Court held in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), is required under the eighth amendment in order to impose the death penalty. Gardner v. Florida, 430 U.S. at 364, 97 S.Ct. at 1207.

The plurality stated: "Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." Gardner v. Florida, 430 U.S. at 360, 97 S.Ct. at 1205. This "opportunity to comment" is intended to guarantee that "the death sentence [does not] rest[ ] on an erroneous factual predicate." Id. at 360, 362, 97 S.Ct. at 1205, 1206.

In the instant case appellant does not contend that he was denied the "opportunity to comment" on the presentence report. Indeed trial counsel brought to the attention of the trial court the fact that virtually all of appellant's previous convictions were invalid under United States v. Tucker,

supra. The trial court specifically disclaimed reliance on the convictions as an aggravating circumstances but also specifically found that even without the uncounseled convictions no mitigating circumstances were presented. Record at 751-52. While there is some merit to the contention that a mitigating circumstance was presented, [27]

27. Once the uncounseled convictions are removed from appellant's record, there remains only the conviction for forgery, and evidence of a statutorily approved mitigating circumstance may be presented. Fla.Stat.Ann. 921.141(6)(a) identifies as a mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." (emphasis added). While this court will not be heard to say that a conviction for forgery is not serious, what qualifies as "significant" under the Florida statute must be evaluated in light of Florida Supreme Court interpretations of this factor and in relation to the grave issue of whether or not the death penalty should be imposed. The Florida Supreme Court has approved an interpretation of this provision supporting a finding of mitigation where the defendant had a prior conviction for burglary and had admitted to a theft. The state supreme

[Footnote 27 Cont.]
court apparently accepted the lower court's finding that these two indidents of prior criminal activity combined did not rise to the level of a "significant history of prior criminal activity." Salvatore v. State, 366 So. 2d. 745, 748, 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115, reh. denied, 444 U.S. 975, 100 S.Ct. 474, 62 L.Ed.2d 393 (1979). Cf. Smith v. State, 407 So.2d 894, 900-01 (Fla. 1981) (confessions to "various" crimes constituted significant history); Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981) (previous murder is significant history); Washington v. State, 362 So.2d 658, 666 (Fla. 1978) (course of burglaries, confessions to continuous stealing of property constitutes significant history), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). Clearly this statutory mitigating circumstance has not been limited to absence of all serious criminal activity. Forgery is a serious offense, but surely no more "significant" than burglary or theft. Given the prior interpretation of this mitigating circumstance, there is a possibility that if Douglas had appealed the trial court's finding of no mitigating circumstances the Florida Supreme Court would have found the finding erroneous.

appellant never appealed the finding of no mitigating circumstances to the Florida Supreme Court, as is evidenced

by the opinions of that court in Douglas I, 328 So.2d at 22 and Douglas II, 373 So.2d at 896.

Even if we assume arguendo that use of the invalid convictions made the predicate for appellant's sentence erroneous,[28] Gardner did not create an absolute constitutional right to have the death sentence rest on a completely accurate factual basis regardless of the failure of counsel to take advantage of opportunities to bring erroneous information to the attention of the state courts. To interpret the Gardner decision in such a way would be to circumvent the ruling of Wainwright v. Sykes and its progeny, see, e.g., Ford v. Strickland, supra (applying Sykes to failure to raise issues on direct appeal), which imposes a burden on the habeas petit-

28. See note 27 supra.

ioner's counsel either to raise claims first in state court or to explain the failure to have done so. Gardner was decided on the ground that the procedure of keeping information confidential violated due process protections. Here appellant was afforded all the procedure necessary to ensure that his death sentence did not rest on "an erroneous factual predicate." Counsel's failure to take advantage of the procedure is simply not redressable under the theory of Garnder.

The second element of the claim that use of the uncounseled convictions presents a constitutional violation, and the argument most clearly presented, is that the Florida Supreme Court failed to limit its reliance on the prior invalid convictions to negation of mitigation.

In affirming the imposition of the

death sentence the state supreme court stated:

> The evidence is clear that the murder was committed in a cold and calculated manner. No evidence of mitigation was produced. The trial judge buttressed his decision that the death penalty should be imposed by the inclusion in his findings of fact information from a presentence investigation report which the defendant was given the opportunity to traverse. The report reflected that the defendant was 37 years old and had been previously convicted of a number of felonies including grand larceny, breaking and entering (twice), forgery, and misdemeanors. The defendant had previously received penitentiary sentences aggregating seventeen years and an undesirable military discharge. We conclude, as did the trial judge, that the death penalty is the proper sentence.

Douglas I, 328 So.2d at 22 (emphasis supplied).

Based on this portion of the supreme court's opinion and particularly in light of the failure of that court explicitly to state that it too was

limiting reliance on the prior invalid convictions to support a finding of absence of mitigation, appellant in effect argues that this court must infer that the invalid convictions were used as evidence of aggravation and that such use tainted the reliability of the review process.[29]

The federal habeas court below ruled that the trial judge's explicit

29. Appellant more clearly made this claim in the state supreme court in state post-conviction relief proceedings. There the claim was rejected under a harmless error rationale in that no mitigating circumstances had been found and the Florida Supreme Court relies on a presumption that death is the appropriate sentence where there are no mitigating factors. Douglas II, 373 So.2d at 896, citing Spenkellink v. State, 372 So.2d 65 (Fla. 1979)(England, C.J. concurring); State v. Dixon, 283 So.2d 1 (Fla. 1973). Cf. Riley v. State, 366 So.2d 19, 22 (Fla. 1978) (remand required where improper aggravating circumstances considered and a mitigating circumstance existed). Appellant does not challenge this presumption and we make no ruling as to its constitutional validity.

limitation of use of the presentence report to verification of absence of mitigating evidence was conclusive on the issue of any impropriety in the trial judge's or the state supreme court's handling of the report. Douglas v. Wainwright, 521 F.Supp. at 793. We affirm that conclusion.

To support his argument that the Florida Supreme Court used the convictions as aggravating evidence, appellant relied solely on that court's statement that the trial court used the convictions to "buttress[ ] his decision that the death penalty should be imposed," Douglas I, 328 So.2d at 22, and the federal district court's observation that "[t]he Florida Supreme Court gave some support to ... the possibility that it had [ ] considered such convictions in its review of petitioner's sentence." Douglas v. Wainwright, 521

F.Supp. at 793. We conclude that appellant's argument provides no basis for finding that the Florida Supreme Court did not limit use of the prior convictions to support the absence of mitigating evidence. [30]

30. The Supreme Court's recent decision in Barclay v. Florida, U.S. , 103 S.Ct. 3418, 76 L.Ed.2d (1983) (plurality opinion); id. at , 103 S. Ct. at 3431 (Stevens & Powell, JJ., concurring), indicates that the use of nonstatutory aggravating factors is not a constitutional infirmity. The plurality stated that there is "no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances," and that failure of the Florida Supreme Court to control use of nonstatutory factors is only an error of "state law." , 103 S.Ct. at 3428. The court did say however that use of such factors is of constitutional magnitude if it rises "for some other reason to the level of a denial of rights protected by the United States Constitution." Id. Here, of course, if the State Supreme Court did use uncounseled convictions to enhance punishment, the principles of United States v. Tucker and Gideon v. Wainwright would be violated.

A review of the structure of the portion of the Florida Supreme Court

opinion relating to the presentence report supports this conclusion. In affirming the death sentence and analyzing whether the death penalty was excessive on the facts of this case, the Supreme Court first discussed and approved the trial court's finding that the crime qualified as heinous, atrocious and cruel, satisfying statutory aggravating circumstances. Fla.Stat. Ann. § 921.141(5)(h). Douglas I, 328 So.2d at 22-23. The court next discussed the cold-bloodedness of the killing, apparently alluding to aggravating circumstance. § 921.141(5)(i). Id. at 23.[31] Then the court proceeded to discuss the absence of mitigating

31. This aggravating circumstance was not part of the trial court's findings but appellant does not raise any challenge to this apparently additional finding by the Florida Supreme Court on direct review.

evidence. In conjunction therewith, the court noted the trial judge' reliance on the presentence report and the prior convictions and other information presented in the report. Since all of the discussion of the information contained in the report is so obviously separated from the discussion of any aggravating circumstance, the logic of the relevant portion of the opinion flows only if one concludes that the convictions were considered in light of mitigation. See Elledge v. State, 408 So.2d 1021, 1023-24 (Fla. 1981) (reference to organization of trial judge's order verifies that evidence was used to show absence of mitigation, not to support an aggravating factor). As appellant provides no other evidence that the information

was used for any purpose other than to negate a finding of mitigating factors, there is no basis for a finding that the information was used as evidence of aggravation.

[22,23] The law is clear that the sentencer's knowledge of invalid convictions in and of itself does not require resentencing where the court has not relied on the invalid convictions to enhance the punishment. United States v. Mission, 597 F.2d 60, 61 (5th Cir.1979); United States v. Gaither, 503 F.2d 452 (5th Cir. 1974); Lipscomb v. Clark, 468 F.2d 1321, 1323 (5th Cir. 1972); See also, Farrow v. United States, 580 F.2d 1339, 1345 (9th Cir. 1978). Where counsel failed on direct appeal or in state habeas proceedings to bring to the attention of the state courts that use of the

invalid convictions may have precluded a finding of a mitigating circumstance, and where there is insufficient evidence to support the contention that the convictions were used in any other way that would present a federal constitutional violation warranting habeas corpus relief, we affirm the denial of habeas relief on this ground.

V. Judge's Imposition of Death Sentence after Jury Recommendation of Life Imprisonment

[24] In the sentencing phase of the bifurcated trial, the jury recommended that Douglas be sentenced to life imprisonment, rejecting the only other possible sentence, death. Under Fla.Stat.Ann. § 921.141(2) a jury sentencing determination is treated as merely "advisory" and the trial judge is the final arbiter of the sentence.[32] Appellant argues, supported by a thorough brief by amicus curiae, that to fail to treat an "advisory" jury sentence of life imprisonment as final violates the due process protections of the fourteenth amendment and, additionally, the double jeopardy clause of the fifth amendment, as applied to the states through the fourteenth.

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32. Once defendant has been convicted of the capital felony, the only sentencing options are life imprisonment or

[Footnote 32 Continued]

death. Fla.Stat.Ann. §921.141(2)(c) and (3).

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Appellant does not argue that jury sentencing is constitutionally required in capital cases, but rather that where a state provides for jury recommendations of sentence, a recommendation of life may not be overturned by the trial judge. This argument is based primarily on an analogy, in light of the similarities between the procedures employed in the guilt phase of all criminal jury trials and the sentencing phase in capital trials in Florida, to the finality afforded a jury verdict of acquittal in the guilt phase of criminal trials. Appellant's argument,

however, if forclosed by three United States Supreme Court decisions that have approved the constitutionality of the Florida statute.

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court specifically approved the provision calling for judical rather than jury sentencing. Although the jury in Proffitt had recommended death so that the Court was not directly confronted with the issues raised by imposition of the death penalty after a jury recommendation. This awareness is evidenced by its citation to Tedder v. State, 322 So.2d 908 (1975), in which the Florida Supreme Court enunciated the standard that must be satisfied before a judge can reject a jury

life recommendation.[33]

The Supreme Court in Dobbert v. Florida, 432 U.S. 282,295 & n.9, 97 S.Ct. 2290, 2299 & n.9, 53 L.Ed. 2d 344 (1977), more clearly approved the process whereby the judge may impose death after a jury recommendation of life. There the Court considered a challenge to the Florida capital sentencing statute under the ex post facto clause of Article I, § 10 of the United States Constitution.[34] Dobbert had been sentenced to death under the statute here in question. The challenge was based on the fact that under the statute in effect prior to the current one and at the time Dobbert committed

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33. "A jury recommendation under our trifurcated death penalty statute should be given great weight. In

[Footnote 33 Continued]

order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d at 910.

34. "No State shall . . . pass any . . . ex post facto law. . ." Article I, § 10, United States Constitution.

the murder jury sentencing decisions were final. Since in his case the judge imposed the death sentence after a jury recommendation of life, Dobbert alleged that the new statute acted as an ex post facto law as applied to him.

The Court decided that the current statute, enacted in 1972 in response to Furman, was not an ex post facto law because it represented only a procedural change, and one which, in general, was an

ameliorative, not an onerous, revision of the law. Id. at 294, 97 S.Ct. at 2298. In discussing the generally ameliorative nature of the current statute, Justice Rehnquist quoted the standard ot Tedder,[35] and then stated: "A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder." Id. at 295-96, 97 S.Ct. at 2299. In a footnote the Court went on to say: "The fact that the trial judge had recommended life in this case in no way denigrates the procedural protections afforded by the new procedure. The judge did so in circumstances where there were obvious and substantial aggravating

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35. See note 33 supra.

factors, and where there had been on significant mitigating factors adduced." Id. at 296 n.9, 97 S.Ct. at 2299 n.9.

Appellant and amicus curiae would have this court disregard the Supreme Court's approval of the Florida procedure whereby a trial judge may override a jury life recommendation on the basis that the language in both Proffitt and Dobbert was only dicta, as the Court was not there directly presented with the precise issue now raised. Further, amicus curiae argue that language in the more recent Supreme Court decision, Bullington v. Missouri, 451 U. S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981), casts doubt on the constitutionality of the practice here challenged and evidences that the

Supreme Court would not hold that a jury recommendation of life should treated as final where a jury, based on statutory findings, has rejected the death penalty. See id. at 445-46, 101 S.Ct. at 1861-62. But see United States v. DiFrancesco, 449 U. S. 117, 132, 101 S.Ct. 426, 434, 66 L. Ed.2d 328 (1980).

Whatever the merit of appellant's claim and whatever the degree of speculative doubt Bullington cast on the continued viability of the approval in Proffitt and Dobbert of the practice now challenged, since this case was argued the Supreme Court has clearly reaffirmed its approval of the Florida procedure. Barclay v. Florida, _____U.S. ____, at ____, ____, 103 S.Ct. 3418, at 3425, 3427, 3428, 76 L.Ed.2d ___(1983)

(plurality opinion); id. at ___ ___, 103 S.Ct. at 3426-3427 (Stevens & Powell, JJ., concurring). Under the decisions in Barclay, Dobbert and Proffitt, the system of overriding jury recommendations of life imprisonment is not unconstitutional.

VI. Ineffective Assistance of Counsel.

[25] Appellant finally argues that he was deprived of the effective assistance of counsel at the penalty phase of the trial due to trial counsel's failure to consult with appellant and other potential witnesses prior to the penalty phase and to investigate and present evidence which might have been considered mitigating. He also points to counsel's comments to the sentencing judge prior to the penalty phase. Appellant argues that even though the jury returned an advisory sentence of life imprisonment, he was prejudiced by counsel's alleged ineffectiveness and its impact on the sentencing judge. He also contends that the district court below erred in not holding an evidentiary

hearing on the ineffective assistance claim.

The sixth amendment right to counsel extends to criminal defendants the right to "effective assistance of counsel, that is, counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243,1250(5th Cir.Unit B 1982)(en banc),[36] cert. granted ____U.S. _____, 103 S.Ct. 2351, 76L.Ed. 2d ___(1983). MacKenna v. Ellis, 280 F.2d 592,599 (5th Cir. 1960), adhered to en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed. 2d 78 (1961). The assistance of

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[36] In Stein v. Reynolds Securities, Inc., 667 F.2d 33,34(11th Cir. 1982), this circuit adopted as precedent all decisions of Unit B of the

[Footnote 36 Cont.]

former Fifth Circuit.

counsel must not be judged by benefit of hindsight, but must be reviewed "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." Washington v.Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981). This standard makes it imperative that the circumstances as known to counsel at the time in question be reflected in the record. Where the record is inadequate, complete review of the habeas claim is thwarted.

The district court stated, in reference to all of appellant's habeas claims, that "Petitioner did not seek an evidentiary hearing and the Court

found that none was required." Douglas v. Wainwright, 521 F.Supp. at 792. As accurately pointed out in the Brief for Appellant and reflected in the record, however, counsel for Douglas did request an evidentiary hearing on the ineffective assistance claim.[37]

Regardless of the request, the rule in this circuit is that a federal habeas court must hold an evidentiary hearing and find facts relevant to the habeas claim where the state has not held an evidentiary hearing that adequately develops material facts and a complete record on which the district court can rely in resolving

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[37] Transcript of July 24, 1979 Motion to Stay Hearing at 88-90.

the habeas issues. Guice v. Fortenberry, 661 F.2d 496 at 500 (5th Cir. 1981); Scott v. Estelle, 567 F.2d 632 (5th Cir. 1978); Goodwin v. Smith, 439 F.2d 1180 (5th Cir. 1971). See also Jordan v. Estelle, 594 F.2d 144 at 146 (5th Cir. 1979); Burden v. State, 584 F.2d 100 at 102 (5th Cir. 1978) (where state record is inadequate to assess merits of habeas claim, district court must hold an evidentiary hearing). Cf. Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983)(where state has held an evidentiary hearing but material facts are not adequately developed, absent inexcusable neglect/ deliberate bypass by petitioner, a federal evidentiary hearing must be held); Guice v. Fortenberry, 661 F. 2d 496, 506-07 (5th Cir. 1981)(en banc)(same). Exceptions to this

general rule are recognized where either (1) the facts alleged by appellant, even if proved, would indicate he is not entitled to relief, Guice v. Fortenberry, 661 F.2d at 503; Easter v. Estelle, 609 F.2d 756(5th Cir. 1980); Cronnon v. Alabama, 587 F.2d 246 (5th Cir.), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L. Ed.2d 792 (1978); or (2)even if appellant alleged sufficient relevant facts "The record before the district court was sufficient for a proper examination of [petitioner's] claims." Winfrey v. Maggio, 664 F.2d 550,552 (5th Cir.1981). See Flores v. Estelle, 578 F.2d 80 (5th Cir.1978), cert. denied, 440 U.S. 923, 99 S.Ct. 1253, 59 L.Ed.2d 477 (1973) (where state has provided a full and fair hearing on the issue raised in

federal habeas, based on that record the federal court can adjudicate without repeating the hearing process).

In the instant case, as the state court did not hold an evidentiary hearing on this claim, the district court did not have the benefit of a record from such a proceeding.

Even so, having reviewed the trial transcript, we conclude that "the record before the district court was sufficient for a proper examination of [petitioner's] claims." Winfrey v. Maggio, 664 F.2d at 552. Based on that record, however, the district court's conclusion that the trial counsel was reasonably effective was erroneous and we reverse.

[26] Assessment of the effectiveness of counsel is a mixed question of law and fact. Cuyler v.

Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708 (1980). Hence the clearly erroneous standard does not apply to the district court's judgment on this issue. Proffit v. Wainwright, 685 F. 2d 1227, 1247 (11th Cir.1982). Nor does the presumption of correctness of 28 U.S.C. §2254(d) apply to the state court's conclusion of effectiveness.[38] Goodwin v. Balkcom, 684 F.2d 794,804 (11th Cir.1982), cert. denied, ____U.S.____, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983).

[27] The record shows Douglas' trial was the first case in that county under the Florida capital punishment statute enacted after Furman v. Georgia. At commencement

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[38]Of course, these deferential standards do apply to findings of historical fact.

of the penalty phase of the trial, after the state indicated that it would rely on the guilt phase evidence to support the finding of aggravating circumstances, defense counsel proceeded to make an argument to the jury for mercy. The state objected on the ground that the proceeding was for presenting evidence, not argument. The court instructed defense counsel to proceed with the evidence. Defense counsel responded: "I have no evidence to submit to the Court at this time." IV Trial Transcript at 609-10. The judge then called for a conference with all counsel in his chambers, in which he explained to defense counsel that mitigating evidence should be produced at this phase of the trial.

Defense counsel replied: "Well,

let the record show from the hour of 12:30 to 1:30 or 2:00 [the recess time between the guilt and penalty phases], that the defendant has been unable to obtain any evidence and objects to proceeding at this time with the shortness of notice--" Id. at 610-11. When asked by the court what evidence he would wish to obtain counsel stated: "I don't know, Your Honor. Let the record show that the attorney for the defendant does not know at this time. He does not know what he could obtain or what he might obtain." Id. at 611. Counsel for the state then pointed out that the case had been set for trial for a considerable period, that the possibility always existed that Douglas would be convicted, and that the statute sets forth what evidence

could be presented at the sentencing phase. Id.

The court suggested to defense counsel that he put appellant's mother on the stand to testify that "he's been a good boy. . ." Id. at 612. Defense counsel's response was: "But he hasn't been a good boy." Id.

The court then asked whether counsel had discussed with Douglas the possibility of his testifying in has own behalf. Counsel admitted: "No, Your Honor, I have not." Id.

At the court's suggestion Douglas was brought into the conference. The court gave a brief explanation to him about his right to testify on his own behalf and introduce evidence in mitigation. Id. at 614. The judge then prepared to

leave so that counsel would discuss with Douglas the possible importance of taking the stand and presenting mitigating evidence. The judge stated: "I don't want you to say anything here before me, because in [the] ultimate analysis, I have the responsibility of [imposing sentence], so I want to make sure that you have every opportunity to present any evidence which you may have tending to mitigate this crime." Id. Before the judge could leave, Douglas stated he did not want to take the stand. The judge asked him if he realized he was giving up a valuable right. Douglas answered affirmatively, then was taken outside, without ever conferring with defense counsel.

Defense counsel's first statement after Douglas left was: "I'm

not completely familiar with a proceeding like this. This is the first I've ever been involved in." Id. at 615. After asking the court's guidance as to what arguments he could make to the advisory jury, defense counsel stated: "I mean, I don't want to get in an argument with the court and I don't understand the statute." Id. at 615-17. Counsel for the state pointed out that his argument was completed "unless some testimony is offered." Id. at 617. Defense counsel emphasized again: "I have none. For the purpose of the record. . .This man will appeal, I'm sure. . . The attorney for the defendant objects to the entry of proceedings supposed-- commenced at 2:00 o'clock, after a verdict rendered at 12:30, on the grounds

he did not have ample time to either investigate or prepare any such argument, evidence, or otherwise, as might be presented in behalf of the defendant for mitigation." Id. at 617. The court then noted that if counsel could point to some mitigating evidence he hoped to ascertain, the court would consider granting a continuance. Defense counsel rejoined he was "not aware of any witnesses that he might call; he's not aware of any evidence that he might present..." Id. at 618. The court asked if counsel had discussed this with his client. Counsel said: "Briefly, yes, Your Honor. . . There's been a short discussion with the client and due to the shortness of time that neither the client nor his attorney is prepared to offer anyone."

Id. at 618. It was thus clear that the only discussions with appellant did not include whether Douglas should take the stand and occurred only in the time between the guilt and penalty phase, during counsel's avowed lack of understanding of that phase, and even before the judge attempted to alleviate counsel's lack of understanding.

Toward the end of the conference the following colloquey ensued:

> Defense counsel: Judge, I'm really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time.
>
> The Court: I think you've got the right to get up there and talk this is a human life.
>
> Defense Counsel: Well, that's the only thing I can say.

Id. at 620 (emphasis added).

The arguments to the jury were

given. The jury unamimously recommended life imprisonment. The trial judge, before whom all these statements by counsel were made, overrode the jury recommendation and imposed the death penalty. IV Trial Transcript at 754-55.

The district court ruled that defense counsel's statements indicating a lack of understanding of the procedure and importance of the proceeding could not be taken at face value because "[e]xperience indicates that some people depreciate their own knowledge and ability as a trial tactic for persuasive reasons." Douglas v. Wainwright, 521 F.Supp. at 807. We disagree. Even if the statements made by counsel could be deemed strategic, for the reasons set forth infra this strategy falls

within the category of choices that are "so patently unreasonable that no competent attorney would have made it." Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. Unit B 1982) (en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451, 76 L.Ed. 2d ____(1983).

The district court found counsel effective because "[w]ith the patient and entirely fair procedure followed by the trial judge Mr. Kirkland did talk with the petitioner several times between the guilt and penalty states of the trial." Douglas v. Wainwright, 521 F.Supp. at 807.

Even if this statement of the facts were not clearly erroneous, which it is, talking to the defendant in a span of an hour before the sentencing phase of the trial

does not meet the standards of effective assistance. In Washington v. Strickland, 693 F.2d at 1252, the court ruled that "permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense." See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, ____U.S.____, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983) ("At the heart of effective representation is the independent duty to investigate and prepare"); Weidner v. Wainwright, 708 F.2d 614 at 616 (11th Cir. 1983).

As indicated above, counsel here conceded before the trial court that he had done nothing to prepare for the penalty phase of the trial. He did not discuss with the defendant

the possibility of taking the stand to ask for mercy. The district court stated that Douglas "made it clear that he did not want to testify." Douglas v. Wainwright, 521 F.Supp. at 807. The record shows, however, that appellant's statement that he did not want to testify was in response to a question by the judge after no consultation with counsel and just a few minutes before the sentencing proceeding was to begin.

Further, while appellant had not suggested to counsel any witnesses who could have been called to testify, counsel had discussed the need for such a suggestion, if at all, only "briefly" between the guilt and sentencing phases. As evidenced by the conference in the judge's chambers, counsel did not understand

the purpose of the penalty phase, so he would have been unable to advise appellant as to the need for and the significance of witnesses at the penalty phase.

In Scott v. Wainwright, 698 F.2d 427, 429-30 (11th Cir.1983), this court determined that because a guilty plea cannot be made knowingly and voluntarily if counsel fails to advise the defendant of the options available to him, ineffectiveness is presented when that advice is lacking. So too, here, counsel's failure to advise appellant of the importance of taking the stand or suggesting witnesses evidences blatant ineffectiveness.

The most egregious examples of ineffectiveness do not always arise because of what counsel did not do,

but from what he did do--or say. Apparently failing to appreciate that the trial judge was the ultimate sentencer, counsel repeatedly emphasized to the judge, during the conference in chambers and out of the hearing of the jury, that not only did counsel have no evidence to proffer at that time but that apparently there was no mitigating evidence that could be produced in Douglas' case. He explicitly volunteered that appellant had "not been a good boy" and therefore no purpose would be served by his mother testifying.[39] He highlighted before the judge that all he could argue to the jury was thet Douglas' was a human life because there was no other

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[39] The district court made a federal determination that appellant

[Footnote 39 Continued]

did not want his mother to testify. Douglas v. Wainwright, 521 F.Supp. at 807. This is clearly erroneous. All the record reveals is that he did not want his mother brought into the conference in the judge's chambers. IV Trial Transcript at 614.

evidence.

Counsel's ineffectiveness cries out from a reading of the transcript. See Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (although degree of preparation necessary may be difficult to discern, competent counsel would have handled the case far differently than did trial counsel). The district court's conclusion to the contrary is error.

In Washington v. Strickland, 693 F.2d at 1258, this court held that a habeas petitioner may prevail on an ineffective assistance claim

only if he shows denial of effective assistance and actual prejudice to the course of his defense. In so doing we rejected the allegedly harsher standard of prejudice set forth in United States v. Decoster, 624 F. 2d 196, 208 (D.C. Cir.1979)(en banc), which required a habeas petitioner to show a "likelihood that counsel's inadequacy affected the outcome of the trial." Certiorari was granted, apparently because of this conflict. ____U.S.____, 103 S.Ct. 2451, 77 L. Ed.2d ___(1983). Because, under virtually any standard, prejudice is evident on the face of the record, it is necessary that we withhold decision in this matter pending the Supreme Court's resolution of the conflict.

Even if we assume for these purposes that there was no mitigating

evidence that could have been produced,[40] a vital difference exists between not producing any mitigating evidence and emphasing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence. This situation can be analogized to one where instead of simply not putting a defendant with a criminal record on the stand, defense counsel in closing argument says: "You may have noticed the defendant did not testify in his own behalf. That is because he has a significant prior record of convictions and we did not want the prosecutor to cross-examine him about them." Similarly, the instant case

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[40] However, as noted on page 23 of appellant's breif, and discussed supra note 27, the record as it stands

[Footnote 40 Continued]

reveals that some mitigating evidence in the form of "no significant history of prior criminal activity" may have existed. Fla.Stat. Ann §921.141(6)(a). Further, counsel's failure to advise appellant of the importance of taking the stand or suggesting witnesses make virtually meaningless, for purposes of assessing prejudice, Douglas' forbearance of the opportunity to testify or suggest potentially mitigating evidence or other possible witnesses.

is analogous to one where the state presents its evidence, the defense presents none, but, rather than maintaining silence or arguing to the jury about reasonable doubt, defense counsel states: "You may have noticed we did not present any evidence for the defense. That was because I couldn't find any."

Here actual prejudice is readily discernable. The advisory jury did not hear the statements made by

counsel in the judge's chambers. They unamimously recommended life imprisonment. The judge who heard all the same evidence as did the jury but in addition was privy to the counsel's comments and behavior imposed the death sentence.

We hold that counsel's ineffective representation created both an "actual and substantial disadvantage to the course of [Douglas'] defense," Washington v. Strickland, 693 F.2d at 1258, and a great "likelihood that counsel's inadequacy affected the outcome of the trial." United States v. Decoster, 624 F.2d at 208.

The denial of habeas corpus relief on the claim of ineffective assistance at the penalty phase is REVERSED. The matter is REMANDED to the district court to issue the

writ unless the state resentences appellant in appropriate proceedings within a reasonable time.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

RONEY, Circuit Judge, concurring in part and dissenting in part.

I concur in the affirmance of the denial of habeas corpus relief as to the conviction. I specially concur in the result reached in Part II, Public Trial Issue. I do not concur in that part of the opinion which attempts to address factual situations not here present, nor in such other portions of the opinion which are not necessary to the affirmance on the public trial point. I concur fully in Parts III,IV and V.

I respectfully dissent from Part VI of the opinion which holds

that defendant was prejudiced at the penalty phase because of statements made by his attorney to the sentencing judge, outside the hearing of the jury. That counsel was effective before the jury is conclusively shown because the jury recommended life, the best it could do for defendant. Under such circumstances, it seems to me to skew the system where we fault the attorney for honestly and frankly discussing his case with the trial judge. Somehow, I always thought that was precisely what attorneys are supposed to do. Certainly the judge is supposed to impose the death penalty only on the records of the trial and sentencing proceedings. In the ten years since this crime was committed, defendant has yet, as far as the records show,

to come up with the suggestion of any hard fact that would tend to mitigate this atrocious crime. Thus the failure to produce mitigating evidence was not the fault of the attorney.

I would affirm the district court.

EXCERPT OF TRANSCRIPT OF

TRIAL HELD SEPTEMBER 25-28, 1973

For the State: MR. CAMPBELL

For the Defense: MR. KIRKLAND

THE COURT: The defendant will please rise. Harken to your verdict, ladies and gentlemen.

MR. WILLIAMS: Case number CF73-16320. Bartow, Florida. September 28th, 1973. We, the jury, find the defendant, Howard Virgil Lee Douglas, guilty of first degree murder as charged in the indictment. So say we all. Signed, Shirley H. Olinger, Foreman.

THE COURT: Please be seated. Ladies and gentlemen, as I explained at the first of the trial, we are now operating under a bifurcated or separated system. Your verdict is received, approved and entered.

The second stage of this trial is where you sit in an advisory capacity to the Court and the case is reopened for the admission of testimony touching upon the type of sentence which should be entered under the circumstances.

For you to hear that evidence and to advise the Court by your findings as to what you think is proper.

Now, I would like to send you to lunch. I cannot allow you to be separated at this time. We had made arrangements for 1:00 o'clock and I will ask you to be at ease.

Mr. Walker, will you check and see if cars can be made available and if so----

MR. WALKER: They're on the way now.

THE COURT: They're on the way now? All right. You'll go out to John's Restaurant. I want you to sit together. There will be two bailiffs with you. Although the verdict is in and the trial is over to that extent, we're still in the position where you should not discuss the matter or permit anyone to discuss it in your presence.

(Informal discussion off the

record.

The jury left the Court-room.)

THE COURT: Will the defendant and his Counsel come to the bench?

(The defendant and his Counsel approached the bench.)

THE COURT: Mr. Douglas, you have been found guilty by the verdict of a jury of your peers, the crime of murder in the first degree as charged in the indictment filed in this cause.

Do you have any cause to say why the Court should not adjudge you to be guilty of such offense?

(No response by Mr. Douglas nor his Counsel.)

THE COURT: All right. Its the judgment of this Court that you are guilty of the offense of murder in the first degree as charged in the indictment in this cause and sentence, of

course, will be withheld until the second section of the sentencing procedure is completed.

Now, Bailiff, I wish you'd take him to the jail for lunch and we will try to resume here at 1:30.

Will Counsel for State and Defense be ready to proceed at that time?

(Informal discussion off the record.)

THE COURT: All right. Now, gentlemen, this is--I'd like both of you prepared at that time to proceed with testimony as under the statute and we will go from there.

(Informal discussion off the record.)

THE COURT: Do you wish time for motions?

MR. KIRKLAND: Pardon?

THE COURT: Do you wish any motions to be filed? Set 15 days for motions?

MR. KIRKLAND: Yes sir.

THE COURT: Do you have the instructions I propose to give?

MR. KIRKLAND: I have not, Your Honor.

MR. CAMPBELL: No sir.

THE COURT: I would like that back when the hearing is over. If there are objections I will give you an opportunity to express them before I give them.

(Informal discussion off the record.)

THE COURT: Ladies and gentlemen, let me say by way of explanation of the proceeding we're entering upon, which is new in our law.

Past statutes were condemned because there had been established in the statutes no standards for consideration or for use by the jury in the determination of this particular matter.

It, at that time, was left solely

to the discretion of the jury that unbridled discrimination resulting in, under like circumstances, variances of decision.

To correct that, this particular proceeding has been established and under this, you will be called upon to decide by majority vote of the jury what sentence you wish to recommend to the Court.

Under this statute basic factors are:

1. Whether there are sufficient aggravating circumstances connected with the offense, to justify recommendation of the death penalty and

2. Whether there are sufficient mitigating circumstances in existence which would outweigh the aggravating circumstances and result in recommendation from the jury to the Court of life imprisonment.

As I previously explained, this is a recommendation and the ultimate responsibility is on my shoulders.

Now, at this time, we will proceed on the items which are established as criteria for your determination and I will give those to you in detail by written instruction at the end of the taking of the testimony.

Mr. Campbell, you may proceed, sir.

MR. CAMPBELL: Your Honor, the State moves that the jury be instructed to consider the evidence which was presented in the first portion of this trial as aggravating circumstances, which, under the statute, made this a capital felony especially heinous, atrocious and cruel and that they should consider the testimony in the first trial in their considerations of their determination as to whether or not mercy should be recommended.

Other than that, at this stage, the State has no further presentations to make.

THE COURT: Ladies and gentlemen, this is the law. The evidence with which you've heard and found to be worthy of credit and acceptance and belief by you in the first stage of the trial is still within your minds and within your consideration and should be a part of and is a part of the evidence which is available in this second or sentencing stage.

Mr. Kirkland, you may proceed, sir.

MR. KIRKLAND: Ladies and gentlemen of the jury, I don't need to tell you about the shift and I cannot argue the fact----

MR. CAMPBELL: Your Honor, I don't think this is the appropriate time for argument.

THE COURT: This is evidentiary.

MR. KIRKLAND: I'm not arguing.

THE COURT: Well, we're not having opening statement. Let's proceed with evidence and then you may argue at the conclusion.

MR. KIRKLAND: I have no evidence to submit to the Court at this time.

THE COURT: Let me see Counsel up here.

(Counsel approached the bench.)

(Court and Counsel retired to the Conference room.)

THE COURT: As a part of the bifurcated trial the statute establish and limit evidence which the State may offer as to aggravating circumstances. It does not limit the defendant and as I read the statute, it opens up to almost anything that he wishes to offer in mitigation of his offense.

He has been convicted; he may now take the stand to explain his conduct or

any excuse that he had for it, his past record, whatever you may conceive, what he can conceive, in a plea for mercy.

MR KIRKLAND: All right. Now, with the instructions that the Court has presented--and I don't have my notes in front of me--I think there should be an instruction as to the emotional state of the mind and disturbance as set forth in the statute, which is not included in the Court's instructions.

THE COURT: I'm going to charge them exactly on the terms of the statute, what they--factors to be considered, but I'm concerned about evidence.

MR. KIRKLAND: Well, let the record show from the hour of 12:30 to 1:30 or 2:00, that the defendant has been unable to obtain any evidence and objects to proceeding at this time with the shortness of notice----

THE COURT: Tell me what evidence

you wanted to obtain.

MR. KIRKLAND: I don't know, Your Honor. Let the record show that the attorney for the defendant does not know at this time. He does not know what he could obtain or what he might obtain.

MR. CAMPBELL: Your Honor, this case has been set for trial for a considerable period of time. As a matter of fact, it was continued once at the State's request and there was always a possibility that the defendant would be found guilty of first degree murder and that he would be placed into this position and the statute says can be presented.

THE COURT: His family are here.

MR. KIRKLAND: Will the Court allow the motion----

Will the Court allow them to hear the mother from the witness stand say well, I don't want my boy to go to the

electric chair?

MR. CAMPBELL: I think that's not proper.

THE COURT: Now, that's not----

MR. KIRKLAND: Well, that--Your Honor----

THE COURT: She could testify that he's been a good boy, if that be the case, and, of course, we all know he's----

MR. KIRKLAND: But he hasn't been a good boy.

THE COURT: All right. The State would be permitted to cross examine on that.

MR. KIRKLAND: That is correct. May I ask the Court if he----

THE COURT: Does he--would he---- Have you discussed with him his taking the stand now that he's convicted and trying to explain his actions?

MR. KIRKLAND: No, Your Honor, I have not.

THE COURT: I think that you should.

MR. KIRKLAND: Is Mr. Campbell--do you intend to put his criminal record on or what?

MR. CAMPBELL: I have presented my case.

MR. KIRKLAND: You've presented yours?

MR. CAMPBELL: Yes.

THE COURT: Well, he'll be entitled to come back in rebuttal as in----

MR. KIRKLAND: Well, he'll be entitled to come back in rebuttal as in----

MR. KIRKLAND: Well, I know that, Your Honor. If I put the defendant on the stand he's also subject to cross examination.

THE COURT: Well, this is---- You get him and bring him in here.

(The defendant entered the conference room.)

MR. KIRKLAND: May I talk with him

a second, Judge?

THE COURT: Yes sir.

(Defense Counsel conferred with his client.)

THE COURT: Mr. Douglas, have a chair. You realize the position you're in. I've talked to your Counsel. I want to make sure that you have the opportunity to present any proper evidence before this jury, because they are sitting there determining whether they wish to recommend a life sentence or death.

Your attorney has concern, fearing to put you on the stand for fear of cross examination as to your past record. I don't know what was in your mind.

The facts have been determined by the verdict of the jury, but if there's any excuse or anything you can offer as justification or anything for--to justify them recommending mercy, that is your opportunity.

This Court cannot advise you what to do. I don't know the facts. I do know, because I obtained a copy of the record and presented it to your attorney while the jury was deliberating, to aid in preparing for this stage of the trial if this eventuality did come to pass.

Your family are here. I don't want you to say anything here before me, because in ultimate analysis, I have the responsibility of that, so I want to make sure that you have every opportunity to present any evidence which you may have tending to mitigate this crime.

Now, I'm going to step out. We've had this time. Do you want any of-- members of his family brought in here, Counsellor?

MR. KIRKLAND: Don't want any of your family in here? No, Your Honor. Let the record reflect that the defendant does not wish to have any members

of his family brought in.

THE COURT: How long would you like to discuss this with him?

MR. DOUGLAS: I don't want to take the stand.

THE COURT: Do you realize this is your right under the constitution and the laws?

MR. DOUGLAS: Yes sir, I do.

THE COURT: And its a valuable right you're giving up?

MR. DOUGLAS: Yes sir.

THE COURT: Well, I won't inquire why; that's none of my business.

MR. KIRKLAND: You can take him out now. I'd like a further conference with the Court and Mr. Campbell.

THE COURT: All right, sir.

(The defendant left the conference room.)

MR. KIRKLAND: I'm not completely familiar with a proceeding like this.

This is the first I've ever been involved in.

THE COURT: Its the first any of us have in this Circuit.

MR. KIRKLAND: All right. Now, when we get to the next question, before we get in a hassle out in open Court, as I read the statute, I can tell everybody why I think the death penalty shouldn't be applied.

THE COURT: Yes sir.

MR. KIRKLAND: For moral reasons as well as the reasons as set forth in that statute.

THE COURT: I'll permit you to make your argument.

MR. KIRKLAND: I mean, I don't want to get in an argument with the Court and I don't understand the statute, Judge, and I don't----

THE COURT: Well, Counsel, I don't think you agree, but I think this--the

purpose of this statute is to--as I see it-- to provide some standards.

As you know, in the past, the death penalty has been inflicted in varying degrees; its been left purely to the discretion of the jury and this statute is designed to establish standards.

To bring some order, some logic and reason out of this determination. I will permit you to argue. I think you are bound by the rules of evidence.

MR. KIRKLAND: That's the point, Your Honor, where I have my concern. As I recall the statute, somewhere along the lines in there they say in general conformity with the rules of evidence.

THE COURT: Well, we release them. There's an opportunity even for hearsay, provided there's an opportunity to get it. There, the rules are fairly well relaxed, but at the same time you're basically confined to evidence.

You can't get up there and testify to the jury as to what happened on this occasion.

MR. KIRKLAND: That's true.

THE COURT: We must accept the fact----

MR. KIRKLAND: I recognize----

THE COURT: ----this is murder----

MR. KIRKLAND: ---- that they found him guilty as charged.

THE COURT: ---- and you can plead with them, with human life involved.

MR. CAMPBELL: But you can't go out ----

MR. KIRKLAND: I realize I can't touch on the testimony. Now, may I ask this: What is the procedure of argument?

THE COURT: Be the same as in the trial.

MR. KIRKLAND: Same as in the trial. Whenever you've made your opending argument. Is that correct?

MR. CAMPBELL: I've made no argument; I just told the Court that I was presenting no other testimony except that that's there and asked the Court to instruct them to consider that testimony. Our argument is concluded unless some testimony is offered.

MR. KIRKLAND: I have none. For the purpose of the record---- This man will appeal, I'm sure.

MR. CAMPBELL: Well, its required.

MR. KIRKLAND: I'm talking about after that.

----that the attorney for the defendant objectes to the entry of the proceedings supposed--commenced at 2:00 o'clock, after a verdict rendered at 12:30, on the grounds that he did not have ample time to either investigate or prepare for any such argument, evidence, or otherwise, as might be presented in behalf of the defendant for

mitigation.

THE COURT: Counsellor, do you have witnesses you want called which have not been made available here? I think this is something that should have been contemplated as to the nature of the charge.

The provision of this statute, as early as practicable this procedure will be handled and when we can get these 12 jurors back, of course, is a practical problem.

If you assure me that you do have in mind testimony you wish to submit in his behalf and when that can be available, then I'll certainly entertain a motion for a continuance.

MR. KIRKLAND: Well, let the record state that Counsel for the defense, as stated previously, due to the shortness of notice is aware of any witnesses that he might call; he's not aware of any evidence that he might present----

THE COURT: Have you discussed this wish your client?

MR. KIRKLAND: Briefly, yes, Your Honor.

THE COURT: But you say he doesn't have anybody to suggest to you?

MR. KIRKLAND: At this---- Let the record reflect, at this particular point, there's been a short discussion with the client and due to the shortness of time that neither the client nor his attorney is prepared to offer anyone.

THE COURT: Well, you get with your client right now and if he's got some names of witnesses he can tell you he would like to have testify in his behalf in this continuing procedure, then I would grant a reasonable continuance to do so.

MR. KIRKLAND: Well, Your Honor, I'll get with him.

THE COURT: Then why shouldn't we

proceed?

MR. KIRKLAND: Well, naturally I'm going to object, Your Honor.

THE COURT: Well, I know, but if you can tell me there are witnesses you want to----

MR. KIRKLAND: I cannot assure this Court of any witness; I have no witness; I know of no witness----

THE COURT: ----and your client can't tell you of any witness.

MR. KIRKLAND: ----and my client can tell me of no witness.

THE COURT: All right. Then I see no recourse except to proceed. Now, if you're going to offer no testimony, it boils down to an argument.

MR. KIRKLAND: Yes sir.

THE COURT: How long do you want for argument?

MR. KIRKLAND: There's not exactly a lot that I can say. How long do you

want; ten minutes?

MR. CAMPBELL: Oh, I'd say 15 to 20 minutes. I'm not going to argue long. I don't--just don't know; I've never been through this kind before.

MR. KIRKLAND: Judge, I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time.

THE COURT: I think you've got the right to get up there and talk this is a human life.

MR. KIRKLAND: Well, that's the only thing I can say.

THE COURT: And he'll have the right to come back and say----

MR. KIRKLAND: ----that he took a human life.

THE COURT: And show him the same mercy that he showed this man.

(Informal discussion off the

record.

Court and Counsel returned to the Courtroom.)

THE COURT: Mr. Kirkland, do you wish to present any witnesses?

MR. KIRKLAND: I have none, Your Honor.

THE COURT: Gentlemen, I'll permit you to argue to the jury on this particular phase of the proceeding.

* * *

THE COURT: The defendant will rise. Harken to your verdict, ladies and gentlemen.

MR. WILLIAMS: State of Florida, vs. Howard Virgil Lee Douglas, defendant. Case number CF73-16320. We, the jury have heard evidence under the sentencing procedure in the above cause as to aggravating circumstances so defined in the Court's charges existed in the

capital offense here involved in the Court's charge outweigh such aggravating circumstances do find and advise that the mitigating circumstances do outweigh the aggravating circumstances.

We therefore advise the Court that a life sentence should be impsosed herein upon the defendant by the Court. Signed, Shirley H. Olinger, Foreman. Signed at Bartow, Florida, September 28, 1973.

EXCERPT OF HEARING ON MOTION
TO VACATE HELD JULY 17, 1979,
AFTER DEATH WARRANT WAS SIGNED

And further, Your Honor, that he did not spend sufficient time with Mr. Douglas to adequately prepare the case or offer anything in mitigation. Counsel in this case should have been prepared, fully prepared, that there could have been a conviction, that there would have to be a penalty phase in the trial; and he should have gone out and made adequate preparation to present evidence in mitigation.

We feel he didn't fully investigate and prepare this case in terms of presenting this Court with mitigating factors in terms of sentence.

THE COURT: Do you know his counsel was a former Assistant United States District Attorney?

MR. METCALFE: I know, Your Honor.

THE COURT: Privately employed?

MR. METCALFE: Yes, I know it, too, Your Honor.

THE COURT: And had represented the defendant in prior cases.

MR. METCALFE: That I didn't know.

THE COURT: And he's not, as you say here, alive to answer.

MR. METCALFE: To defend himself to these charges. And I don't like to bring any allegations against another lawyer; but at this stage my client has indicated the factors to us, I think I have no other choice but to do it.

EXCERPT OF SENTENCING

PROCEEDING HELD DECEMBER 4, 1973

THE COURT: Didn't I offer to continue to let you subpoena any necessary witnesses and again during the sentencing proceeding, didn't -- Mr. Douglas, reviewing back to the chambers and didn't I offer to continue it, didn't I ask him to produce witnesses, suggest that he use members of --

MR. DOUGLAS: No sir, you asked me to produce witnesses why I shouldn't go to the electric chair.

THE COURT: This is during the sentencing procedure.

MR. DOUGLAS: This is time you called me back and read me my rights to take the stand in my own behalf and then you give me the opportunity to call forth witnesses before the jury retired to recommend their verdict of mercy or non-mercy.

THE COURT: I urged you, actually, didn't I?

MR. DOUGLAS: Yes, but these witnesses there would have been rebuttal witnesses to the testimony of Mrs. Helen Atkins, so therefore they would have been no good at that time. I've got a certified statement from every one of them.

Office - Supreme Court, U.S.
FILED
FEB 29 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-817

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
Secretary,
Florida Department of Corrections, et al.

vs.

HOWARD VIRGIL LEE DOUGLAS,
Respondent/Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision of the Eleventh Circuit Court of Appeals holding that the Respondent was denied the effective assistance of counsel when the appellate court found that counsel's ineffectiveness prejudiced the Respondent given any of the conflicting legal standards used to assess prejudice when an ineffective assistance of counsel claim is raised.

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PRELIMINARY MATTERS REQUIRED BY RULE 34, RULES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 34.2, Rules of the Supreme Court of the United States, the preliminary matters required by Rule 34.1(b), (d), (e) and (f) of the Supreme Court Rules have been omitted since they have been accurately set forth in the petition and cross-petition for certiorari.

STATEMENT OF THE CASE

The facts material to resolution of the question presented for review which have not been fully set out previously in either Petitioner's or cross-petitioner's statement of the case are set out below.

Howard Virgil Douglas was convicted of murder in the first degree by a Florida state court. After the jury returned its verdict, the court told the jury that there would be a sentencing phase in which the jury would sit in an advisory capacity (Petitioner's Appendix, p. 126). The court then excused the jury for lunch. After the jury's exit, the court asked counsel to be ready to proceed with the sentencing/penalty phase of the capital proceeding at 1:30 PM (Pet. App., p. 129). When the jury returned after lunch, the court briefly explained how the sentencing phase operated (Pet. App., pp. 130-31). The prosecution then chose not to introduce any new evidence in the sentencing phase but rather to rely on the evidence during the guilt phase of the trial (Pet. App., pp. 132-33).

Counsel for the defendant began his presentation at the penalty phase by stating:

> "Ladies and gentlemen of the jury, I don't need to tell you about the shift and I cannot argue the fact... (Pet. App., p. 133)."

This statement prompted an immediate objection from the prosecution "that this is not the appropriate time for argument" (Pet. App., p. 133). The court then admonished counsel for the defendant to proceed with evidence and to defer argument (Pet. App., p. 134). In response to the court's admonition, counsel for the defendant stated:

> "I have no evidence to submit to the Court at this time," (Pet. App., p. 134).

The court then asked to see counsel at the bench and then retired with counsel to its conference room.

In the conference room, outside the presence of the jury, the court attempted to explain to counsel for the defendant how the penalty phase in a capital proceeding worked (Pet. App., p. 134). The court specifically noted that, "as the court read the statute," almost anything could be offered in mitigation (Pet. App., p. 134). In response to the court's concern about evidence being introduced, counsel for the defendant stated:

> "Well, let the record show from the hour of 12:30 to 1:30 or 2:00 that the defendant has been unable to obtain any evidence and objects to proceeding at this time with the shortness of notice" (Pet. App., p. 135).

The court then inquired of counsel as to what evidence he wanted to obtain (Pet. App., pp. 135-36). Counsel replied that he didn't know what he could obtain

or might obtain (Pet. App., p. 136). The court then stated that the defendant's family was present implying that counsel asked whether the defendant's mother could testify that he didn't want her boy to go to the electric chair (Pet. App., pp. 136-37). When the court answered that she could testify that he's been a good boy, counsel responded to the court by stating:

> "But he hasn't been a good boy" (Pet. App., p. 137).

The court, while counsel for the parties were still in its conference room, next asked counsel for the defendant if he had discussed with his client taking the stand (Pet. App., p. 137). Counsel responded that he has not (Pet. App., p. 137). After stating to counsel that he thought he should, the court asked that the defendant, Douglas,

be brought to the conference room. After Douglas was brought in, the court said to the defendant that he wanted to make sure he had every opportunity to present any evidence in mitigation and asked whether he wanted his family members brought in (Pet. App., pp. 139-40). Counsel for Douglas then stated that the defendant did not want his family brought in (Pet. App., pp. 140-41). The defendant also said at this time that he did not wish to testify (Pet. App., p. 141). At this point, counsel asked that his client, Douglas be "taken out" and that he wanted a further conference with the court and the prosecutor (Pet. App., p. 141).

After Douglas had left, counsel for the defendant sought guidance from the court as to what was the procedure to be followed during the penalty phase (Pet. App., p. 141). In the course of this

discussion, counsel for Douglas made the following comments:

> "I mean, I don't want to get in an argument with the Court and I don't understand the statute, Judge and I don't.... (Pet. App., p. 142).
>
> "I have none" (no evidence to introduce in mitigation) (Pet. App., p. 145).
>
> "That the attorney for the defendant objects to the entry of the proceedings supposed ...commenced at 2:00 o'clock, after a verdict rendered at 12:30 on the grounds that he did not have ample time to either investigate or prepare for any such argument, evidence, or otherwise, as might be presented in behalf of the defendant for mitigation" (Pet. App., p. 145).

After this latter comment, the court again asked counsel whether he had any witnesses he wanted called. The court further emphasized that the penalty phase was something counsel should have contemplated given the nature of the charge and that if he had any evidence to

introduce he would entertain a motion for a continuance (Pet. App., p. 146). Counsel responded that because of "the shortness of notice" he was not "aware of any witnesses he might call or evidence he might present" (Pet. App., p. 146).

The court then asked whether he had discussed this (the penalty phase) with his client (Pet. App., p. 147). Counsel replied "briefly" but that "due to the shortness of time" neither he nor his client was prepared to offer anyone (Pet. App., p. 147). The court then instructed counsel to "get with" his client to see if he knew of any potential witnesses, and if he did, the court would grant a reasonable continuance (Pet. App., p. 147). Although counsel said he would, before doing so, he stated to the court that he knew of no witnesses and his client could tell him of no witnesses

(Pet. App., p. 148). He never then talked with his client at this point.

In response, the court then stated that it had no recourse except to proceed (Pet. App., p. 148), and asked counsel how long he wanted for argument. Counsel answered:

> "Judge, I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time" (Pet. App., p. 149).

To this comment, the court responded:

> "I think you've got the right to get up there and talk this is a human life" (Pet. App., p. 149).

Counsel then answered:

> "Well, that's the only thing I can say" (Pet. App., p. 149).

The court and counsel then returned to the courtroom. Counsel for the defendant was next asked in the presence

of the jury if he wished to present any witnesses. He stated:

> "I have none" (Pet. App., p. 150).

The prosecutor and counsel for the defendant then made final arguments to the advisory jury (transcript of trial testimony, Volume IV, pp. 621-25). In this argument, counsel for the defendant emphasized that Douglas would not be eligible for parole until he was approximately 62 or 63 years old and that he would be locked up like an animal (TR., pp. 623-24). His closing argument and hence his entire presentation in mitigation took up approximately 1 1/2 pages of the record (TR., pp. 623-25).

The jury recommended life imprisonment, rejecting imposition of the death penalty (Pet. App., pp. 150-51). At a post-trial proceeding, four months

after the guilt and penalty phase, the court chose not to follow the jury recommendation and sentenced the defendant to death.

In post-conviction collateral proceedings a state trial court, the Florida Supreme Court, see Douglas v. State, 373 So.2d. 895 (Fla. 1979), and a federal district court, see Douglas v. Wainwright, 521 F. Supp. 790 (M.D., Fla. 1981), rejected Douglas' claim that he was denied the effective assistance of counsel incident to the penalty phase of his capital trial. No evidentiary hearing was conducted by any of these courts with regard to this claim. The Eleventh Circuit Court of Appeals, however, see Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), set aside the sentence of death, finding that Douglas was denied the effective assistance of

counsel at the penalty phase because of his counsel's failure to investigate any mitigating evidence, his failure to consult with Douglas about the penalty phase prior to same, and because of counsel's repeated emphasis to the trial court, the sentencer, outside the presence of the jury, that no mitigating evidence existed. In concluding that these failures warranted the setting aside of Douglas' death sentence, the Eleventh Circuit held that counsel's ineffectiveness not only created an "actual and substantial disadvantage" to Douglas' defense, see Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc), cert. granted, ____U.S.____, 103 S. Ct. 2451, 77 L.Ed.2d 1332 (1983), but also created a great likelihood that counsel's inadequacy affected the outcome of the trial," see

U.S. v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). By reaching this dual conclusion, the Eleventh Circuit obviated the need to address the question presently pending before this Court in Washington v. Strickland, Case No. 82-1554, of what standard is to be used in determining whether a defendant has been prejudiced by ineffectiveness of his counsel, thus entitling him to relief. In this context, despite the fact that Washington v. Strickland was and is pending in this Court, a petition for rehearing and rehearing en banc in this case was denied by the Eleventh Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

THIS CASE DOES NOT INVOLVE A TRUE CONFLICT BETWEEN A DECISION OF A FEDERAL COURT OF APPEALS AND THE HIGHEST COURT OF A STATE

Petitioner's argument that this Court should grant certiorari in the instant matter is premised on this Court's action in granting certiorari in Washington v. Strickland, supra. Petitioner asserts that the question presented for review herein is essentially the same question presented in Washington v. Strickland. Petitioner has phrased that question in terms of a conflict between the Eleventh Circuit Court of Appeals and the Florida Supreme Court with regard to the standard to be used in assessing the validity of

ineffective assistance of counsel claims. The Respondent has no quarrel with Petitioner's assertion that the Eleventh Circuit Court of Appeals and the Florida Supreme Court currently do use different standards in this context, at least with regard to the degree of prejudice that must be established to warrant relief, assuming counsel's representation was ineffective, compare Washington v. Strickland, supra, and Knight v. State, 394 So.2d 997 (Fla. 1981). Where the Respondent differs with Petitioner, however, is with regard to whether the instant case unlike Washington, supra, presents this conflict. It is respondent's belief that it does not. It does not, because in the instant matter, the Eleventh Circuit specifically held that the Respondent was entitled to relief irrespective of what standard was

used to determine whether the Respondent was prejudiced by his counsel's ineffectiveness, Douglas v. Wainwright, 714 F.2d 1532, at 1558 (11th Cir. 1983). Hence, the instant case, unlike Washington, supra, does not involve a true conflict between a federal circuit court of appeals and the highest court of the state of Florida. It is not a case then which falls within the parameters of Rule 17 1(a), Rules of the Supreme Court of the United States, which rule suggests that this Court will grant certiorari "when a federal court of appeals ... has decided a federal question in a way in conflict with a state court of last resort." Rather, it is a case in which the state of Florida is simply asking this Court to reverse a decision of the Eleventh Circuit with which it does not agree. In this context, as has been said

on numerous occasions by members of this Court, the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.[1] As former chief Justice Taft put it,

---

[1]Stern and Gressman, Supreme Court Practice, 5th Ed. 1978, pp. 297-98. See, for example, the comments of former Chief Judge Vinson reprinted in Stern and Gressman, supra, at pp. 258-59:

> "During the past term of Court, only about 15% of the petitions for certiorari were granted, and this figure itself is considerably higher than the average in recent years. While a great many of the 85% that were denied were far from frivolous, far too many reveal a serious misconception on the part of counsel concerning the role of the Supreme Court in our federal system. I should like, therefore, to turn to that subject very briefly.
>
> "The Supreme Court is not, and never has been primarily concerned with the correction of errors in

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ.

Magnum Co. v. Coty, 262 U.S. 159, at 163 (1923).

Unlike Washington v. Strickland, supra, then, this case does

> lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the natural rights & uniformity of Judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and

not present a true conflict between a decision of the Eleventh Circuit Court of Appeals and the highest court of the state of Florida. Contrary to the assertions of the state, this Court should not grant certiorari in the

(Footnote 1 Cont'd)

> treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country."

instant case because it has done so in Washington, supra.

THE DECISION BELOW IS CLEARLY CORRECT

Rule 17 1(a), Rules of the Supreme Court of the United States, suggests that this Court will grant certiorari, absent a conflict, "when a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of [the] court's power of supervision." Not only does the decision of the Eleventh Circuit in the instant case not fall within this language, but its ruling on Respondent's ineffective

assistance of counsel claim is clearly correct.

Petitioner's quarrel with the holding of the Eleventh Circuit with regard to the merits of Respondent's ineffective assistance of counsel claim seems to lie with the Court's conclusion as to whether the Respondent was prejudiced because of counsel's failings. In this context, given the record of the penalty phase, there can be little doubt that Respondent's counsel failed to render effective assistance during that phase of the trial.[2] Not only does the

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[2]The fact that Respondent's counsel failed to render reasonably effective assistance was so clear to the Eleventh Circuit from the record that it felt it could make such a finding even in the absence of an evidentiary hearing on this issue, Douglas, supra at 1554. No evidentiary hearing with regard to this issue was ever held by the state trial court or federal district court.

record vividly illustrate that counsel did not understand how the penalty phase operated, but it also makes clear that counsel did not investigate or pursue any potential defenses, nor did he consult with his client prior to the penalty phase. Finally, as the Eleventh Circuit emphasized, counsel's failings were exacerbated by his repeated emphasis to the Court, the ultimate sentencer, that there existed no mitigating evidence, Douglas, supra at 1557. By any standard then, Douglas' counsel failed to render reasonably effective assistance, given the totality of circumstances including the fact that Respondent's life was at stake. Clearly, a condition precedent to any effective representation is that counsel independently investigate and prepare, see Washington v. Strickland, supra; Goodwin v. Balkcom, 684 F.2d 794

(11th Cir. 1982), cert den., ____U.S.____, 103 S. Ct. 1798, 767 L.Ed.2d 364 (1983); Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983); Rummell v. Estelle, 590 F.2d 103 (5th Cir. 1979). Respondent's counsel simply did not do so. Equally important to effective representation is that counsel not prejudice his client through his own comments, see King v. Strickland, supra. Here, as the Eleventh Circuit emphasized, counsel did so during the penalty phase.

Petitioner's quarrel then with the Eleventh Circuit decision is with its findings as to prejudice. In this context, it must be emphasized that the jury unanimously recommended life imprisonment, Douglas, supra, at 1535. As such, given Florida law, see

Tedder v. State, 322 So.2d 928 (Fla. 1975), in order to override the jury recommendation, the trial court would have to find that "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," Tedder, supra at 910. Given this standard, it was imminently reasonable for the Eleventh Circuit to conclude that respondent's counsel's failings as set out previously not only "created an actual and substantial disadvantage to the course of ['Douglas''] defense" but also "a great likelihood that counsel's inadequacy affected the outcome of the trial," Douglas, supra at 1558. Any other conclusion would render meaningless the constitutional guarantee to the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS,

NO. 83-817

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections, etc.,

Petitioners/Cross-Respondents

vs.

HOWARD VIRGIL LEE DOUGLAS

Respondent/Cross-Petitioner

On Cross-Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

BRIEF OF PETITIONERS/CROSS-RESPONDENTS ON JURISDICTION

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As provided in Rules 22 and 34.2, since all preliminary matters set forth in Rule 34.1(b-g) have been thoroughly and accurately stated in both the petition for writ of certiorari and the cross-petition for writ of certiorari, cross-respondents will omit same.

REASONS FOR NOT GRANTING THE WRIT ON CROSS-PETITION

Public Trial Issue

Douglas says that his right to a public trial under the Sixth Amendment was violated by virtue of the limited closure which took place in his trial. He says that the precise issue has not previously been before this Court for decision. While it is true that the issue has not been subject to direct decision by this Court, it is also true that the precise question in this case was presented in the petition for writ of certiorari previously denied by this

Court. See Douglas v. Florida, 429 U.S. 871 (1976).

The only difference regarding the issue is that there, he sought review of the Florida Supreme Court's determination that no Sixth Amendment deprivation occurred and here, he seeks review of the Eleventh Circuit Court of Appeals' identical determination.

Douglas merely presents the essential contention that his right to a public trial is absolute and that any reasons which may have favored closure did not outweigh that right. He does little if anything to present compelling argument directed to any claimed deficiency contained in the circuit court's analysis of the issue. He fails to reveal just how the decision either represents unacceptable precedent or is of such widespread effect that this Court should exercise its jurisdiction

and review the issue. The holding of the circuit court on this issue was nothing more than: based on the facts and circumstances of this case, the limited closure during the testimony of one witness was justified and thus, no Sixth Amendment violation occurred. This conclusion was based on a thorough and proper analysis of existing law on the subject. It was reached with full consideration of this Court's pronouncements on the general issue and followed well-established federal authorities from other circuit courts.

If anything has changed since Douglas last requested review on this issue, it is the rendering of this Court's decisions which provided more guidance to the federal courts below than was available to the Florida Supreme Court. Be that as it may, there is even less compelling reason to

grant review of the issue in its present posture than there was in 1976.

Invalid Prior Convictions

Here, Douglas presents an issue not appearing in his original petition. He claims that the trial court relied upon prior invalid convictions to reach the determination that the death sentence was appropriate. He claims further that the Florida Supreme Court, when reviewing that determination, likewise relied upon those convictions in approving the sentence.

Douglas proceeds as if the lower resolutions of this issue do not exist. In order to even accept the assertion one would necessarily have to flatly reject as a finding of fact, the respective determinations of the trial court, the Florida Supreme Court, the federal district court, and the circuit court of appeals. As the decisions

clearly show, the trial judge was aware that some of Douglas' convictions were invalid and clearly stated both at sentencing and years later in a hearing on a post-conviction motion that he specifically did not consider any convictions, whether valid or not, when arriving at his determination of sentence. The Florida Supreme Court made specific mention that such was not the case and likewise, both federal courts below ratified that determination of historical fact. Thus, in order to grant the writ on this basis one would necessarily and improperly have to make a contrary finding of fact without any evidentiary support, that which would be contrary to the teachings of Marshall v. Lonberger, ___U.S.___, 103 S.Ct. 843 (1983). Clearly, the proper invocation of this Court's jurisdiction should not and cannot rest on such a proposition.

Override of the Jury Recommendation

Disregarding the circuit court's treatment of this issue, Douglas blithely states that it is unconstitutional to impose a sentence of death in the State of Florida once the jury has made its recommendation of life imprisonment. That this practice is constitutionally permitted has been clearly and repeatedly stated by this Court. Proffitt v. Florida, 428 U.S. 242 (1976); Dobbert v. Florida, 432 U.S. 282 (1977); Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983).

Nothing Douglas presents provides any reason why this Court should reverse the holdings in these decisions.

CONCLUSION

Douglas comes here proceeding as if the Eleventh Circuit Court of Appeals made no decision whatsoever on the three issues he presents. He fails to either question or challenge the analyses of the issues by the court below and introduces no stimulus to conclude that those resolutions are such that this Court should and must accept review.

Accordingly, Petitioners/Cross-Respondents respectfully submit that the Court should deny the cross-petition for writ of certiorari.

Respectfully submitted on this _____day of January, 1984.

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